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NO.

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1993

JAMES BLODGETT, Superintendent,

Petitioner,

v.

PATRICK JAMES JEFFRIES,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether a juror's mere exposure to extrajudicial information about a defendant's prior criminal record violates due process in the absence of a showing of actual bias.

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Petitioner respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

I. OPINIONS BELOW

The opinion of the Court of Appeals, its second amended opinion in this case, is reported at 5 F.3d 1180 (9th Cir. 1993)

and appears at Appendix A. The opinion of the district court, Appendix B, is reported at 771 F. Supp. 1520 (W.D. Wash. 1991). The Court of Appeals' two earlier reported decisions in this case, dated September 9, 1992, and March 3, 1993, appear at Appendices C and D, respectively. *See Jeffries v. Blodgett*, 974 F.2d 1179 (9th Cir. 1992), *amended*, 988 F.2d 923 (9th Cir. 1993).

II. JURISDICTION

The judgment of the Court of Appeals was entered on September 21, 1993. Petitioner's petition for rehearing with suggestion for rehearing en banc (challenging the Court of Appeals' first amended opinion) was denied in that same order. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

III. CONSTITUTIONAL AND STATUTORY PROVISIONS

The Sixth Amendment to the United States Constitution provides, in pertinent part: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed. . . ."

The Fourteenth Amendment to the United States Constitution provides, in pertinent part: ". . . nor shall any State deprive any person of life, liberty, or property, without due process of law. . . ."

Title 28, Section 2254(a) of the United States Code provides:

> The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States.

IV. STATEMENT OF THE CASE

On April 2, 1983, the bodies of Phillip and Inez Skiff were found in shallow graves on the Skiffs' property in rural Clallam County, Washington. At the time of the murders in March of 1983, Patrick James Jeffries was on parole from one of his many Canadian convictions and was a houseguest of the Skiffs. He killed Phillip Skiff by firing seven .22 caliber bullets into his body and killed Inez Skiff with ten bullets. Jeffries departed for Canada with several items of the Skiffs' personal

property, including currency, gold, weapons, and household belongings. He was eventually apprehended in Wenatchee, Washington, after he returned from Canada.[1]

In April 1983, Jeffries was charged with two counts of Aggravated First Degree Murder in Clallam County Superior Court. The case received extensive news coverage by the local media, and most of the pretrial publicity included details about Jeffries' lengthy Canadian criminal record or his status as a parolee. Pursuant to a defense pretrial motion, the trial court ruled that the prosecution could not introduce evidence of Jeffries' Canadian criminal record or his parole status in its case-in-chief during the guilt phase and the penalty phase of trial. 7 REC. 2113; 11 REC. 3566-68.[2] The trial court denied Jeffries' motion for change of venue based upon the pretrial publicity. 1 REC. 175-79.

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[1]The Washington Supreme Court's decision in Jeffries' case contains a detailed discussion of the facts surrounding the murders. *See State v. Jeffries*, 105 Wn.2d 398, 401-06, 717 P.2d 722, *cert. denied*, 479 U.S. 922 (1986).

[2]The citations to "REC." refer to the 22 volumes of the complete state court record filed with the district court.

Jury selection took place between October 4 and 18, 1983. 3 REC. 713 -- 7 REC. 2096. During the course of voir dire, several of the jurors who were selected indicated that they had been exposed to pretrial publicity about the case, most of which included details of Jeffries' Canadian criminal history and parole status. Nevertheless, Jeffries did not exercise any challenges for cause against the jurors who served in his case on the basis of their familiarity with Jeffries' background.[3] Indeed, Jeffries waived six of his twelve available peremptory challenges to the regular jurors and two of his four peremptory challenges to the alternate jurors. 6 REC. 1735; 7 REC. 2086.

Jeffries' trial and special sentencing hearing took place between October 19 and November 7, 1983. 7 REC. 2121 -- 11 REC. 3614. The jury found him guilty of both counts of aggravated first degree murder. 15 REC. 4806, 4808, 4810-11.

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[3]Jeffries exercised a challenge for cause of one of the twelve regular jurors who ultimately served on his jury. However, that juror had had *no* exposure to the news accounts of Jeffries' criminal background, and the juror was challenged for cause on the basis of his responses to a completely different line of questions. 5 REC. 1347, 1352. The trial court denied the challenge for cause. 5 REC. 1352. Although Jeffries could have exercised a peremptory challenge, he waived any further challenge to the juror. 7 REC. 1735.

The same jury subsequently determined that there were not sufficient mitigating circumstances to warrant leniency, and Jeffries was sentenced to death. 15 REC. 4830, 4920-22. No evidence of Jeffries' criminal history was presented in either the guilt or the penalty phase of trial. His conviction and death sentence were affirmed on direct appeal. *State v. Jeffries*, 105 Wn.2d 398, 717 P.2d 722, *cert. denied*, 479 U.S. 922 (1986).

Approximately two years after his trial and while his case was pending on direct appeal, Jeffries filed a personal restraint petition[4] in the Washington Supreme Court alleging juror misconduct. 19 REC. 5794-5803. In support of his petition, Jeffries filed the affidavits of two of his jurors who alleged that a third juror, sometime during a break in the trial, made a passing reference to the fact that Jeffries was a "convicted armed robber" or had a "record". 19 REC.

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[4]A personal restraint petition is a post-conviction collateral relief action in the Washington appellate courts. *See* Washington Rules of Appellate Procedure (RAP) 16.3-16.15.

5804-05.[5] In response to Jeffries' petition, the prosecutor filed the affidavits of eight other jurors, all of whom denied hearing any such comments by any juror. 19 REC. 5825-32, 5835-37, 5862-63.

The Washington Supreme Court denied Jeffries' personal restraint petition, explaining that:

> Mr. Jeffries has not alleged facts which, even if true, show that he was denied a fair trial. The alleged misconduct occurred in the early stages in trial, weeks before any deliberations were commenced. Over two and a half years passed between the trial and the time the alleged misconduct was discovered, indicating that the jurors involved did not believe the misconduct to be significant. In sum, the record unequivocally shows that Mr. Jeffries murdered Phil and Inez Skiff. With such overwhelming evidence, we cannot accept petitioner's argument that he was denied a fair trial because of this alleged juror misconduct.

19 REC. 5866, 5867-68; *In re Jeffries*, 722 P.2d 99 (1986). The Washington Supreme Court also denied Jeffries' two subsequent personal restraint petitions. *In re Jeffries*, 110

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[5]The two jurors who alleged that they heard the remarks, Kathleen Sims and Thomas Tyszko, had both been exposed to pretrial news accounts about Jeffries and the crimes. *See* 6 REC. 1591-1609 (voir dire of Sims); 6 REC. 1716-35 (voir dire of Tyszko). Indeed, Sims was specifically questioned in some detail about her knowledge of Jeffries' criminal record. 6 REC. 1600-04. However, neither juror was challenged for cause despite their familiarity with Jeffries' background.

Wn.2d 326, 752 P.2d 1338, *cert. denied*, 488 U.S. 948 (1988); *In re Jeffries*, 114 Wn.2d 485, 789 P.2d 731 (1990).

In July 1990, Jeffries filed a petition for writ of habeas corpus with the district court. The petition raised a total of eighteen claims, including Jeffries' claims regarding the trial court's denial of his motion for a change of venue and the jury misconduct allegations. The district court conducted an evidentiary hearing on the jury misconduct claim and an independent review of the state court record, and ultimately denied Jeffries' petition. Regarding the venue claim, the district court concluded that Jeffries' right to a fair and impartial jury was not violated by the pretrial publicity in his case. *Jeffries v. Blodgett*, 771 F. Supp. 1520, 1537 (W.D. Wash. 1991); Appendix B-20-22. With regard to Jeffries' jury misconduct claim, the district court found it unnecessary even to determine whether the misconduct occurred at all, concluding that there was "no reasonable possibility that the introduction of extrinsic evidence affected the jury verdict in this action." *Jeffries*, 771 F. Supp. at 1539; Appendix B-26-27.

On appeal, the three-judge panel of the Ninth Circuit initially agreed with the district court's disposition of Jeffries' impartial jury claims. The court agreed that Jeffries had failed to demonstrate actual prejudice due to pretrial publicity. *Jeffries v. Blodgett*, 974 F.2d 1179, 1187-88 (9th Cir. 1992); Appendix

C-15-16. The court also affirmed the district court's resolution of the juror misconduct claim, holding that "[r]esidual memory of pretrial information is generally dealt with in voir dire, and jurors are entitled to be believed when they say that such information will not affect their ability to decide the case on the evidence presented in court." *Jeffries*, 974 F.2d at 1188; Appendix C-17.

On March 3, 1993, however, a divided Ninth Circuit panel issued an amended opinion in which it ruled that Jeffries' jury misconduct claim, if the alleged "record" remark occurred, would require that the writ of habeas corpus be granted. *Jeffries v. Blodgett*, 988 F.2d 923, 933 (9th Cir. 1993); Appendix D-___. Citing *Dickson v. Sullivan*, 849 F.2d 403 (9th Cir. 1988), the majority concluded that, if Jeffries' allegations were true, his conviction must be set aside based upon a supposed similarity between the out-of-court communication at issue in *Dickson* and the communication alleged to have been heard by the two jurors in Jeffries' case. 988 F.2d at 933.[6] However, and somewhat inconsistently, the court also concluded that Jeffries had failed to

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[6]In *Dickson*, a deputy sheriff who was responsible for escorting jurors to and from the courtroom told two jurors that Dickson, who was on trial for bludgeoning a man to death with a pool cue, had "done something like this before." *Dickson*, 849 F.2d at 405. The Ninth Circuit held that the deputy's comment could "only be understood as referring to a previous act of brutality or murder," and that there was thus a reasonable possibility of prejudice requiring that the writ of habeas corpus be granted. *Id.* at 408.

demonstrate actual prejudice from the pretrial publicity in his case. *Id.* at 932-33.

Dissenting, Judge Fernandez criticized the majority for "elevating the mere receipt of prior offense information to what amounts to a per se rule that requires the overturning of a jury verdict." *Id.* at 929. Judge Fernandez observed that the rule announced by the majority "create[s] a threat to the stability of jury verdicts that is almost incalculable." *Id.*

The State filed a petition for rehearing and suggestion for rehearing en banc, and subsequently cited as supplemental authority, pursuant to Fed. R. App. P. 28(j), this Court's decision in *Brecht v. Abrahamson*, ___ U.S. ___, 113 S. Ct. 1710 (1993).[7] The State argued that the error in Jeffries' case, if it occurred at all, was harmless and that *Brecht v. Abrahamson* shifted the burden of proof of harm to Jeffries.

The divided panel of the Ninth Circuit, while acknowledging the new standard for harmless error in *Brecht*,

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[7] *Brecht* held that in federal habeas corpus cases the petitioner bears the burden of proving that a trial error had "substantial and injurious effect or influence in determining the jury's verdict;" that is, a petitioner is not entitled to habeas relief based upon trial error unless he can establish that the error resulted in "actual prejudice." *Brecht*, 113 S. Ct. at 1722. The Ninth Circuit's standard for analyzing jury misconduct claims, the "reasonable possibility" standard, was based upon the *Chapman v. California*, 386 U.S. 18 (1967) standard that held that the State bore the burden of proving that a constitutional error was harmless beyond a reasonable doubt. *See Dickson v. Sullivan*, 849 F.2d at 405 ("reasonable possibility" test is equivalent to *Chapman* harmless error standard).

denied the State's petition and maintained its holding in a second amended opinion that "extrajudicial knowledge of Jeffries' prior conviction for armed robbery [was] especially harmful." *Jeffries v. Blodgett*, 5 F.3d 1180, 1191 (9th Cir. 1993); Appendix A-23. Citing the "potential for prejudice" in Jeffries' case and focusing on the "nature" of the extrinsic information involved, the majority concluded that the error in Jeffries' case, if it occurred, could not have been harmless and would require the granting of the writ. Appendix A-23-24. Judge Fernandez again dissented, criticizing the per se nature of the majority's ruling and observing that "[i]f certain comments were merely made by a juror, an almost 10 year old conviction for two vicious murders will be set aside. That, to my mind, is a travesty." Appendix A-46.

V. REASONS FOR GRANTING THE WRIT

The decision below is in direct conflict with this Court's decisions on juror impartiality and harmless error. As Judge Fernandez observed in dissent, the *Jeffries* decision poses a real threat to the stability of jury verdicts that is almost incalculable. *Jeffries* is an appropriate vehicle for this Court to resolve the split among the circuit courts for determining post-conviction claims involving juror exposure to extrinsic information and to

apply the *Brecht* harmless error standard to such claims in the context of federal habeas corpus proceedings. This Court should grant review and reverse the decision of the Ninth Circuit.

A. Certiorari Should Be Granted Because the Ninth Circuit's Per Se Rule Unjustifiably Undermines the Stability of Jury Verdicts, Requires No Showing of Actual Prejudice, and Improperly Announces a New Rule on Collateral Review.

This Court has repeatedly held that "due process does not require a new trial every time a juror has been placed in a compromising situation. Were that the rule, few trials would be constitutionally acceptable. . . . [I]t is virtually impossible to shield jurors from every contact or influence that might theoretically affect their vote." *Smith v. Phillips*, 455 U.S. 209, 217 (1982). In particular, juror exposure to prejudicial information about the defendant, such as the defendant's prior convictions, does not presumptively deprive the defendant of due process. *Murphy v. Florida*, 421 U.S. 794, 799 (1975). The jury need not be totally ignorant of the facts and issues involved in a case in order to be considered impartial. *Mu'Min v. Virginia*, ___U.S. ___, ___, 111 S. Ct. 1899, 1908 (1991); *Irvin v. Dowd*, 366 U.S. 717, 722 (1961). Courts must be careful to distinguish between mere familiarity with a defendant's background and an actual predisposition against him. *Murphy*, 421 U.S. at 800 n.4.

The burden is on the defendant to establish that a juror is less than impartial, whether the challenge to the juror arises during the course of trial or in the post-conviction setting.[8] Moreover, in the context of federal habeas corpus proceedings, the prisoner must prove that a trial error, even an error of constitutional dimension, had "substantial and injurious effect or influence in determining the jury's verdict;" that is, the prisoner is not entitled to habeas relief unless the error resulted in "actual prejudice." *Brecht v. Abrahamson*, ___ U.S. ___, ___, 113 S. Ct. 1710, 1722 (1993). Habeas relief may not be granted if there is merely a "reasonable possibility" that trial error contributed to the verdict. *Brecht*, 113 S. Ct. at 1721.

1. The Ninth Circuit's decision holds that a juror's mere familiarity with a defendant's criminal background is a violation of due process.

The rule announced by the Ninth Circuit in *Jeffries* regarding juror exposure to extrinsic information about the defendant's criminal history is in clear conflict with this Court's decisions. The Ninth Circuit's rule holds that juror exposure to such information *does* presumptively prejudice the defendant.

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[8] *See Wainwright v. Witt*, 469 U.S. 412, 423 (1985) ("it is the adversary seeking exclusion [of a juror] who must demonstrate, through questioning, that the potential juror lacks impartiality"); *Smith v. Phillips*, 455 U.S. at 215 ("This Court has long held that the remedy for allegations of juror partiality is a hearing in which the defendant has the opportunity to prove actual bias").

The *Jeffries* holding simply focuses on the *potential* for prejudice and concludes that extrinsic information about the defendant's criminal history would necessarily have a substantial impact on the verdict. *Jeffries*, 5 F.3d at 1191. Conspicuously absent from the Ninth Circuit's test is any requirement that the convicted defendant affirmatively prove anything other than the exposure to extrinsic prejudicial information. He need not demonstrate that the juror who was exposed to the information was thereby rendered biased or less than impartial.

One of the ironic yet inevitable results of the *Jeffries* rule is that a convicted defendant will now be able to obtain a reversal based upon a juror's awareness of information that would not otherwise disqualify the juror from serving in the case. In *Mu'Min v. Virginia, supra*, this Court held that criminal defendants have no constitutional right to *voir dire* prospective jurors about the specific contents of news reports to which they had been exposed. 111 S. Ct. at 1908. "[A]nswers to questions about content alone, which reveal that a juror remembered facts about the case, would not be sufficient to disqualify a juror." *Id.* Yet, under *Jeffries*, a defendant will be allowed to conduct the equivalent of a post-trial *voir dire* and obtain relief from his conviction if a seated juror is later exposed to the same non-disqualifying information. What is relevant for constitutional purposes is not the mere exposure to the allegedly

prejudicial information but whether the juror formed a fixed opinion as a result of that exposure. However, the *Jeffries* rule focuses exclusively on whether the exposure occurred and forbids any inquiry into whether the juror formed an opinion as a result.[9]

The Ninth Circuit has created an irrebuttable presumption that a juror's mere exposure to extrinsic information about the defendant's criminal background automatically renders the juror less than impartial and the defendant's conviction a violation of due process. This rule fails to acknowledge the real distinction between a juror's mere familiarity with a defendant's criminal background and an actual predisposition against him,

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[9]The unavoidable Catch-22 nature of the *Jeffries* standard is further complicated by Federal Rule of Evidence 606(b), which provides:

> Upon an inquiry into the validity of a verdict or indictment, a juror may not testify as to any matter or statement occurring during the course of the jury's deliberations or to the effect of anything upon that or any other juror's mind or emotions as influencing the juror to assent to or dissent from the verdict or indictment or concerning the juror's mental processes in connection therewith, except that a juror may testify on the question whether extraneous prejudicial information was improperly brought to the jury's attention or whether any outside influence was improperly brought to bear upon any juror. Nor may a juror's affidavit or evidence of any statement by the juror concerning a matter about which the juror would be precluded from testifying be received for these purposes.

The net effect of *Jeffries* in light of Fed. R. Evid. 606(b) is that, in the post-trial or habeas corpus setting, the defendant will always be allowed to prove that extraneous information or influence occurred but the Government will not be allowed to demonstrate that it had no impact on the juror.

and will only encourage convicted defendants to conduct intrusive post-trial investigations into jury deliberations whenever the defendant has a significant criminal history.

2. The Ninth Circuit's decision allows reviewing courts to set aside jury verdicts on federal habeas corpus in the absence of actual prejudice.

Although *Jeffries* purports to invoke the *Brecht v. Abrahamson* harmless error standard, the Ninth Circuit clearly felt itself bound by its prior decision in *Dickson v. Sullivan*, 849 F.2d 403 (9th Cir 1988), a pre-*Brecht* case applying the "reasonable possibility" standard.[10] Inexplicably, the same error that the *Jeffries* panel originally found harmless under the *Chapman* standard was later determined by the same panel to be "especially harmful" under the less onerous *Brecht* standard. *Compare Jeffries*, 974 F.2d at 1188 *with Jeffries*, 5 F.3d at 1191. There is no principled way for a court to reach such diametrically opposite conclusions while remaining faithful to *Brecht*.

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[10]*See Jeffries*, 5 F.3d at 1191 ("In *Dickson*, we found it 'impossible' to conclude that exposure of one or more jurors to highly prejudicial information regarding the defendant's prior criminal acts was harmless beyond a reasonable doubt. . . . The same concerns that motivated us to grant habeas relief in that case are likewise present here and lead us to the same result even under the *Kotteakos* [*v. United States*, 328 U.S. 750 (1946)] harmless error standard").

Just as a challenged jury instruction may not be viewed in artificial isolation, *see Boyde v. California*, 494 U.S. 370 (1990), habeas courts may not focus single-mindedly on the mere "potential" for prejudice that certain extrinsic information may have on the jury's deliberative process. In *Jeffries*, a proper application of the *Brecht* standard would require, at a minimum, that the court acknowledge that Jeffries' jurors were exposed to pretrial publicity about his criminal background and parole status but that *all* (including the two jurors who were later allegedly tainted) had sworn that they could set aside that information and decide the case solely on the evidence presented in court.[11] It also should have been a factor in the *Brecht* analysis that the prejudicial remark, if made at all, was one that the jurors who allegedly heard it were able to disregard and that it was never a topic for discussion during any of their deliberations.

In short, *Brecht* requires that the habeas petitioner demonstrate actual prejudice, yet the *Jeffries* standard would require the setting aside of a ten-year old conviction and death sentence without any showing of actual (as opposed to

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[11]With respect to Jeffries' separate claim concerning the pretrial publicity in his case, the *Jeffries* court concluded that he had failed to demonstrate actual prejudice: "[I]t is immaterial that almost all of the jurors had heard or read about the case prior to trial. All of these jurors swore under oath that they could impartially judge Jeffries' guilt or innocence." *Jeffries*, 5 F.3d at 1189. Curiously, the *Jeffries* court failed to reconcile that aspect of its decision with its apparent presumption that those same jurors violated their oaths and considered that same extrinsic information in deciding Jeffries' case.

speculative) prejudice. The Ninth Circuit's "potential for prejudice" standard is incompatible with *Brecht*.

3. The Ninth Circuit's decision announces a new constitutional rule of criminal procedure on collateral review in violation of *Teague v. Lane*.

A case announces a "new rule" of criminal procedure when it breaks new ground and the result was not dictated by precedent existing at the time the defendant's conviction became final. *Teague v. Lane*, 489 U.S. 288, 301 (1989). Such new rules will neither be announced nor applied to cases on collateral review unless the new rule falls within one of two narrow exceptions. *Id.* at 310-13. Petitioner specifically argued below that the *Jeffries* amended opinion violated the *Teague* nonretroactivity doctrine because the result (i.e., reversal of Jeffries' conviction and death sentence, without affirmative proof of juror bias) was not *dictated* by precedent existing in 1986 when Jeffries' case became final. *See* Respondent-Appellee's Petition for Rehearing with Suggestion for Rehearing En Banc, at 12-14. The Ninth Circuit rejected Petitioner's *Teague* argument without comment.

As Judge Fernandez specifically observed in his dissent, *Jeffries* elevates the mere receipt of prior offense information into a per se rule requiring the reversal of the jury's verdict, despite the complete lack of evidence of actual prejudice to the

defense. No such rule existed in 1986, and even the *Dickson* case, the main source for the Ninth Circuit's per se rule, was not decided until 1988. Moreover, the facts of the *Dickson* case -- where a deputy sheriff, acting as bailiff, told the jurors that the defendant had killed before -- do not *dictate* the result in Jeffries' case. While the Ninth Circuit perhaps has the authority to create such a per se rule for federal cases in the exercise of its supervisory powers, federal habeas corpus is an inappropriate vehicle for the announcement and retroactive application of such new rules.

B. Certiorari Should be Granted to Resolve the Split in the Circuits and Require the Defendant to Prove Actual Bias Before a Court May Set Aside a Jury Verdict.

Also missing from the Ninth Circuit's new standard is any express assignment of the burden of proof to the defendant, a point on which the circuit courts are split. The circuit courts for the District of Columbia, Fourth, Seventh, Eighth, and Tenth Circuits all place the burden on the Government to disprove prejudice in cases of juror exposure to extrinsic information. *See United States v. Butler*, 822 F.2d 1191, 1195 & n.2 (D. C. Cir. 1987) ("it is the burden of the government to demonstrate that the jury was impartial, and that extrinsic information did not contribute to the verdict"); *Stockton v. Commonwealth of Virginia*, 852 F.2d 740, 744 (4th Cir. 1988) ("the party

supporting the jury's verdict must overcome the rebuttable presumption of prejudice that attaches once an impermissible contact with the jury has been established"), *cert. denied*, 489 U.S. 1071 (1989); *Owen v. Duckworth*, 727 F.2d 643, 646 (7th Cir 1984) ("the burden rests heavily on the Government"); *United States v. Rowley*, 975 F.2d 1357, 1363 (8th Cir. 1988) ("The exposure of the jury to improper communications or extrinsic material evidence creates a presumption of prejudice"); *Johnston v. Makowski*, 823 F.2d 387, 390 (10th Cir. 1987) (reversal is mandatory if there is the "slightest possibility" of harm), *cert. denied*, 484 U.S. 1026 (1988).

The First, Fifth, Sixth, and Eleventh Circuits, however, hold that the defendant or habeas petitioner bears the burden of proving actual bias. *Neron v. Tierney*, 841 F.2d 1197, 1206 (1st Cir. 1988) ("A defendant must show that the [extrinsic information] somehow impaired -- or had the ineluctable tendency to impair -- the juror's neutrality"); *Willie v. Maggio*, 737 F.2d 1372, 1378-79 & n.6 (5th Cir.) ("the standard required for relief is [whether] the defendant was unfairly prejudiced by such outside influence"), *cert. denied*, 469 U.S. 1002 (1984); *United States v. Pennell*, 737 F.2d 521, 532-33 (6th Cir. 1984) ("the burden of proof rests upon a defendant to demonstrate that unauthorized communications with jurors resulted in actual juror partiality. Prejudice is not to be presumed"), *cert. denied*, 469

U.S. 1158 (1985); *United States v. Rowe*, 906 F.2d 654, 656 (11th Cir 1990) ("Prejudice is not presumed. The defendant has the burden of demonstrating prejudice by a preponderance of the evidence").

The burden should belong to the defendant to prove that his jurors were not impartial. The members of the jury do not sit as jurors unless they are able to set aside whatever opinions they may have held and decide the case solely on the evidence presented in court. The jury's verdict is reached only after the presentation of evidence, the arguments of counsel, the trial court's instructions, and the jury's deliberative process. It is therefore inappropriate to presume that a midtrial exposure to extrajudicial information is in all cases so overwhelming that the jurors will necessarily violate their oaths, disregard all that occurred in the courtroom, and become biased against the defendant. Moreover, it would be particularly inappropriate to employ that presumption on federal habeas corpus review, where the petitioner bears the burden of proving that any constitutional error at his trial resulted in actual prejudice. *Brecht v. Abrahamson*, ___ U.S. ___, ___, 113 S. Ct. 1710, 1722 (1993).

"[T]he remedy for allegations of juror partiality is a hearing in which the defendant has the opportunity to prove actual bias." *Smith v. Phillips*, 455 U.S. 209, 215 (1982). Despite the clarity of that pronouncement, the circuit courts are

still divided on the burden of proof issue. This Court should grant certiorari and use *Jeffries* as a vehicle for resolving that split among the circuits.

* * * * * * * * * * * * * *

As Judge Fernandez correctly observed, the *Jeffries* rule poses an incalculable threat to the stability of all jury verdicts in criminal cases, both state and federal. The Ninth Circuit has simply chosen to create a new per se rule under which a defendant's conviction must be set aside if it is later discovered that one or more jurors became aware through extrajudicial sources of the defendant's criminal history. The defendant bears no burden of affirmatively proving prejudice -- prejudice is simply presumed because of the nature of the information, and the error is deemed "especially harmful" as a matter of law. The guaranteed windfall that convicted defendants will receive under *Jeffries* will lead ineluctably to intrusive post-trial inquiries into jury deliberations whenever the defendant has a prior criminal history. What is perhaps most troubling is that the Ninth Circuit chose a capital habeas corpus case in which to announce its per se rule, which amounts to a new constitutional rule of criminal procedure. *Jeffries* constitutes a significant departure from the concept of the finality of jury verdicts.

This Court should grant review and use *Jeffries* as a vehicle for resolving the issue of which party, the Government or the defendant, bears the burden of proof in cases of post-conviction review of juror exposure to extrajudicial information, an issue on which the circuit courts are divided. The Court should also use *Jeffries* as an opportunity to address the application of the *Brecht* harmless error standard to federal habeas corpus review of such claims.

VI. CONCLUSION

Petitioner respectfully requests that the Court grant the writ of certiorari.

RESPECTFULLY SUBMITTED

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APPENDIX A

FOR PUBLICATION

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 91-36017
D.C. No. CV-90-00925-CRD

ORDER AMENDING OPINION AND DISSENT

PATRICK JAMES JEFFRIES,

Petitioner-Appellant,

v.

JAMES BLODGETT, Superintendent,

Respondent-Appellee.

Appeal from the United States District Court
for the Western District of Washington
Carolyn R. Dimmick, District Judge, Presiding

Argued and Submitted
May 12, 1992 -- San Francisco, California

Filed September 9, 1992
Withdrawn: March 3, 1993
Filed: March 3, 1993
Amended September 21, 1993

Before: Alfred T. Goodwin, Jerome Farris and
Ferdinand F. Fernandez, Circuit Judges.

Opinion by Judge Goodwin; Dissent by Judge Fernandez

SUMMARY

Criminal Law and Procedure/Litigation and Procedure

The court of appeals denied a petition for rehearing and rejected a suggestion for rehearing en banc. The court also amended its opinion and dissent vacating a district court judgment and remanding for a factual determination as to the truth of affidavits alleging juror misconduct.

Petitioner Patrick Jeffries was convicted for aggravated murder in Washington and sentenced to death in 1983. During both the guilt and penalty phases of the trial, evidence of prior convictions was excluded. Two years after sentencing, two jurors asserted by affidavits filed in federal court that a third juror had during each phase of the trial communicated to the other jurors that Jeffries was a convicted armed robber. The third juror denied making the statements. Eight of the twelve jurors swore they had not heard any reference to Jeffries's criminal record. The district court assumed the truth of the affidavits, although the state disputed their factual basis, and concluded that the juror misconduct, if any, did not affect the verdict. On appeal, the court of appeals held that the district court had properly applied the relevant law, assuming, as had the

district court, the truth of the affidavits. The court of appeals filed its opinion in that appeal on September 9, 1992. Jeffries petitioned for rehearing.

Granting the petition for rehearing in part, the court had noted that after the petition for rehearing was filed, it became aware of a possible conflict between its original opinion and *Dickson v. Sullivan*, 849 F.2d 403 (9th Cir. 1988), which conflict did not appear to have been briefed or argued in the district court. In *Dickson*, the court granted habeas relief where two jurors were exposed to an out-of-court communication by a deputy sheriff to the effect that Dickson had "done something like this before." Because of the similarity of the communications alleged to have been heard by two jurors in this case, the court concluded that *Dickson* required remand of this case for a factual determination as to the truth of the affidavits.

Judge Fernandez, concurring and dissenting, opined that it must first be determined under all the circumstances whether any assertion heard by a juror had an effect on the verdict.

COUNSEL

Brian R. Phillips, Everett, Washington, for the petitioner-appellant.

Paul D. Weisser, Assistant Attorney General, Olympia, Washington, for the respondent-appellee.

ORDER

The opinion and dissent filed March 3, 1993, slip op. 1841 and appearing at 988 F.2d 923 (9th Cir. 1993) are amended as follows:

> At slip op. 1853; 988 F.2d 933, under "Second B: *Juror Misconduct*," delete the last two paragraphs, and substitute the following:

"In assessing whether the alleged juror misconduct deprived Jeffries of a fair trial, the district court properly invoked the five-part test set out in *Bayramoglu v. Estelle*, 806 F.2d 880, 887 (9th Cir. 1986). In *Bayramoglu*, we held that the following factors are relevant in determining whether the alleged introduction of extrinsic evidence constitutes reversible error:

> (1) whether the extrinsic material was actually received, and if so, how; (2) the length of time it was available to the jury; (3) the extent to which the jury discussed and considered it; (4) whether the material was introduced before a verdict was reached, and if so, at what point in the deliberations it was introduced; and (5) any other matters which may bear on the issue of the reasonable possibility of whether the introduction of extrinsic material affected the verdict.

Id. While instructive, none of the factors should be considered dispositive. *Dickson v. Sullivan*, 849 F.2d 403, 406 (9th Cir. 1988). The ultimate question is 'whether it can be concluded beyond a reasonable doubt that extrinsic evidence did not

contribute to the verdict.' *Bayramoglu*, 806 F.2d at 887 (internal quotations omitted).[1]

"The Supreme Court, however, has recently invoked a less stringent harmless error standard on collateral review. *Brecht v. Abrahamson*, 113 S. Ct. 1710 (1993). to obtain relief, petitioners must now show that the alleged error "'had substantial and injurious effect or influence in determining the jury's verdict.'" *Id.* at 1722 (quoting *Kotteakos v. United States*, 328 U.S. 750, 776 (1946)). Although petitioners now face a greater burden, it would be wrong to assume that federal collateral review had lost much of its force. It is therefore important in applying the new harmless error standard to abide by the cautionary words of the *Kotteakos* Court:

> The inquiry cannot be merely whether there was enough to support the result, apart from the phase affected by the error. It is rather, even so, whether the error itself had substantial influence. If so, or it one is left in grave doubt, the conviction cannot stand.

Kotteakos, 328 U.S. at 765.

"In determining whether the alleged juror misconduct had a 'substantial influence' on the verdict, we turn to *Dickson v. Sullivan*, 849 F.2d 403 (9th Cir. 1988), a case which

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[1]An alternative and equivalent articulation of this test is whether there is a 'reasonable possibility' that the extraneous material could have affected the verdict. *United States v. Navarro-Garcia*, 926 F.2d 818, 821 (9th Cir. 1991).

presented facts very similar to ours. There, we granted habeas relief where two jurors were exposed to an out-of-court communication by a deputy sheriff to the effect that Dickson 'had done something like this before.' In reaching this result, we emphasized the significance of the nature of the extrinsic information received by the jury in evaluating its potential impact on the verdict. *Id.* at 406-07. Here, as in *Dickson*, the extrinsic information was 'both directly related to a material issue in the case and highly inflammatory.' *Id.* at 407.[2]

"Jeffries was convicted and sentenced to death on the basis of two special findings: murder to conceal the commission of the crime of robbery and murder as part of the common scheme or plan to rob. Against this backdrop, we find extrajudicial knowledge of Jeffries' prior conviction for armed robbery to be especially harmful. Where the extrinsic evidence concerns a prior conviction similar to the charge at issue, 'there is a substantial risk that all exculpatory evidence will be overwhelmed by a jury's fixation on the human tendency to draw a conclusion which is impermissible in law: because he did it

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[2]The fact that the extrinsic information came from a juror's personal knowledge rather than from an outside source has no bearing on our analysis. We have previously recognized that a juror's personal knowledge of information concerning the defendant or the defendant's alleged crime constitutes impermissible extrinsic evidence. *United States v. Navarro-Garcia*, 926 F.2d 818, 821 (9th Cir. 1991); *see also United States v. Howard*, 506 F.2d 865, 867 (5th Cir. 1975).

before, he must have done it again.' *United States v. Bagley*, 771 F.2d 482, 488 (9th Cir.), *cert. denied*, 475 U.S. 1023 (1986).

"The potential for prejudice under these circumstances was recognized in *Dickson*, but overlooked by the district court in this case. Moreover, the district court erroneously applied *Bayramoglu* by finding most important 'the fact that even those jurors who actually heard the remark have repeatedly stated it was not a factor in reaching their decision.' Testimony as to the subjective effects of extraneous information is outside the relevant scope of inquiry of a reviewing court. *United States v. Bagnariol*, 665 F.2d 877 (9th Cir. 1981) (Fed. R. Evid. 606 (b) bars consideration of evidence concerning the impact of extrinsic information on the deliberative process). 'Rather, the trial court's factual inquiry is limited to determining the extent, if at all, to which jurors saw or discussed the extrinsic evidence.' *Dickson*, 849 F.2d at 406. The district court should instead have applied an objective test in evaluating the potential impact of the extrinsic evidence on the verdict, keeping in mind the 'highly inflammatory' effect that knowledge of substantially similar prior bad acts has upon the jury. *Id.* at 406-07.

"In *Dickson*, we found it 'impossible' to conclude that exposure of one or more jurors to highly prejudicial information regarding the defendant's prior criminal acts was harmless

beyond a reasonable doubt. *Id.* at 408. The serious concerns that motivated us to grant habeas relief in this case are likewise present here and lead us to the same result even under the *Kotteakos* harmless error standard. Because we conclude that extrinsic information of the nature alleged to have been communicated here, if true, would have had a 'substantial and injurious effect or influence' on the verdict, we vacate the grant of summary judgment, and remand for a factual determination as to the truth of the affidavits."

At slip op. 1864; 988 F.2d 938, under "section B: 'Any Relevant Factors,'" delete the paragraph and substitute the following:

"Jeffries argues that a jury instruction permitting the jury to consider 'any relevant factor' rather than any 'mitigating factors' is ambiguous and thus prevented the jury from making an individualized assessment of the appropriateness of the death penalty. We disagree. The instruction is not ambiguous when read in context. The instructions as a whole, including the definition of a 'mitigating circumstance,' were adequate to guide the jury. Moreover, it is significant that it was at the request of the defendant that the trial court did not provide the jury with the list of statutory examples of relevant factors. There was no error."

At slip op 1869; 988 F.2d 941, under Judge Fernandez's dissent, delete the second paragraph, and substitute the following:

"The question with which we are presented is a narrow one: if a juror has heard an assertion that a person on trial for murder and robbery was previously convicted of armed robbery, is that juror so tainted that the verdict must be overturned? Our dispute is similarly narrow, but exceedingly important. The majority, relying on *Dickson* and on its own independent reasoning, says that the answer is 'yes' and when faced with those two facts sweeps away all other considerations. I say, not necessarily, and that we must still decide whether there *was* an effect on the verdict under all of the circumstances of this case.

"The majority opinion underscores the fears that I have expressed in a dissent to its earlier order granting reconsideration. Slip op. 1841 at 1844-45 (9th Cir. March 3, 1993). If certain comments were merely made by a juror, an almost 10 year old conviction for two vicious murders will be set aside. That, to my mind, is a travesty."

With the opinion and dissent thus amended, Judges Goodwin and Farris have voted to deny the petition for rehearing. Judge Farris has voted to reject the suggestion for rehearing en banc, and Judge Goodwin so recommends. Judge

Fernandez would grant the petition for rehearing, and has voted to accept the suggestion for rehearing en banc.

The full court has been advised of the suggestion for rehearing en banc and no active judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35.

The petition for rehearing is DENIED and the suggestion for rehearing en banc is REJECTED.

OPINION

GOODWIN, Circuit Judge:

Patrick James Jeffries appeals the judgment which denied his petition for a writ of habeas corpus. He was convicted in the State of Washington and sentenced to death on two counts of aggravated first-degree murder. The district judge carefully considered the 18 alleged constitutional violations asserted in the petition and explained, in detail, why none required federal intervention. *Jeffries v. Blodgett*, 771 F. Supp. 1520 (W.D. Wash. 1991). We agree with the district court's resolution of all of the issues except one -- the issue of juror misconduct. We therefore vacate and remand.

While there was no eyewitness to the murders, the state produced evidence from which the jury could find that Jeffries killed Phillip Skiff by firing seven .22 calibre bullets into his body, and killed Inez Skiff by firing ten .22 calibre bullets into her body. He then buried his victims in shallow graves on their

property, and told inquiring neighbors various false stories about their whereabouts. Either before or after the murders, Jeffries helped himself to the currency, gold, weapons and other personal property of the victims. He headed for Canada, leaving a trail of stolen property and witnesses who saw him selling or attempting to sell items stolen from the Skiffs. He was also seen flashing large quantities of Canadian money shortly after the Skiffs had been murdered. The late Mrs. Skiff had recently withdrawn $30,000 in Canadian currency from her bank in Canada. That money was never found or accounted for.

On November 5, 1983, the Clallam County Superior Court jury convicted Jeffries of two counts of aggravated murder. In a special verdict, the jury also found that two aggravating factors had been proven: (1) that the murders were committed to conceal the commission of a crime or to protect or conceal the identity of a person committing a crime, and (2) that the murders were committed as part of a common scheme or plan. Finding insufficient mitigating circumstances to warrant leniency, the jury sentenced Jeffries to death.

The Washington Supreme court affirmed Jeffries' conviction and sentence on direct appeal. *State v. Jeffries*, 105 Wash.2d 398, 717 P.2d 722 (*Jeffries I*), *cert. denied*, 479 U.S. 922 (1986). Jeffries filed three personal restraint petitions in state court, all of which the Washington Supreme Court denied.

In re Jeffries, 722 P.2d 99 (1986) (*Jeffries II*); *In re Jeffries*, 110 Wash.2d 326, 752 P.2d 1338, *cert. denied*, 488 U.S. 948 (1988)(*Jeffries III*); *In re Jeffries*, 114 Wash.2d 485, 789 P.2d 731 (1990)(*Jeffries IV*).

Jeffries then filed this habeas corpus petition in federal district court. The district court denied Jeffries' petition. Jeffries now appeals that denial.

We review de novo the district court's denial of habeas relief. *Dickson v. Sullivan*, 849 F.2d 403, 405 (9th Cir. 1988). However, findings of fact by the state court are entitled to a presumption of correctness under 28 U.S.C. § 2254(d), *Sumner v. Mata*, 449 U.S. 539, 546-47 (1981); *Hamilton v. Vasquez*, 882 F.2d 1469, 1470-71 (9th Cir. 1989), and are reviewed for clear error. *Norris v. Risley*, 878 F.2d 1178, 1180 (9th Cir. 1989).

In his habeas petition, Jeffries raises a number of constitutional issues covering every phase of his journey to this court. With regard to the district court, Jeffries argues that the court erred in failing to grant him an evidentiary hearing on newly discovered evidence and in refusing to allow him to present certain expert testimony. Concerning the Washington State Supreme Court, Jeffries argues that it was error for that court to make use of an improper report prepared by the trial judge. Concerning his state trial, Jeffries raises a number of

issues covering: (1) the form of indictment; (2) fair trial; (3) evidentiary decisions of the trial judge; (4) aggravating circumstances; (5) mitigating circumstance; and (6) ineffective assistance of counsel.

I. *Evidentiary Hearing*

Jeffries argues that the district court erred in refusing to hold an evidentiary hearing concerning "newly discovered" evidence. The evidence concerns testimony of a travel agent who worked in the same town in which the victims had lived. According to her proposed testimony, three sinister-looking people driving a car with California plates entered her travel agency on the day of the murders and asked for directions to Barr Road or to the Barr Road Extension. The victims had lived on Barr Road.

The district court initially granted Jeffries' motion to hold an evidentiary hearing concerning this evidence. However, due to illness, the travel agent did not attend the scheduled hearing. Instead, her deposition was taken and the district court considered the information it contained in denying Jeffries' motion for a new trial.

A federal evidentiary hearing is mandatory if (1) petitioner's allegations, if proven, would establish the right to relief, and (2) the state court trier of fact has not, after a full and fair hearing, reliably found the relevant facts. *Van Pilon v.*

Reed, 799 F.2d 1332, 1338 (9th Cir. 1986). Jeffries can meet neither burden.

First, even if the travel agent's statement is true, Jeffries would not be entitled to relief. The mere existence of newly discovered evidence relevant to guilt is not grounds for federal habeas relief -- more is needed. *Townsend v. Sain*, 372 U.S. 293, 317 (1963); *Gordon v. Duran*, 895 F.2d 610, 614 (9th Cir. 1990). Jeffries must show that the newly discovered evidence would probably have resulted in his acquittal. *Gordon*, 895 F.2d at 614-15; *Quigg v. Crist*, 616 F.2d 1107, 1112 (9th Cir.), *cert. denied*, 449 U.S. 922 (1980). Evidence which suggests only that some other individual *might* have committed the crime rather than showing that the defendant did not commit the crime is insufficient to meet the "probability of acquittal" standard. *Quigg*, 616 F.2d at 1112. Jeffries' proffered evidence shows only that other persons were in the vicinity of the scene of the crime, not that they had any connection with the crime.

Second, Jeffries has already received a full and fair hearing in state court concerning this evidence. *See Jeffries IV*, 789 P.2d at 737.

II. *Expert Testimony*

Before the district court, Jeffries attempted to call to the stand psychologists who were to testify that reasonable jurors would have interpreted the jury instructions and special verdict

form in an unconstitutional manner. Jeffries argues that, in refusing to allow him to introduce such expert testimony, the court committed error. We find no error. *See McDougall v. Dixon*, 921 F.2d 518, 532-33 (4th Cir. 1990), *cert. denied*, ___ U.S. ___, 111 S.Ct. 2840 (1991).

III. *Trial Judge Report*

Jeffries argues that his constitutional right to due process was violated because the state trial judge prepared a trial report for use by the State Supreme Court in its proportionality review without giving Jeffries the opportunity to be heard. Jeffries' argument fails for two reasons.

First, the trial judge twice asked trial counsel for Jeffries to contribute toward preparation of the report but counsel failed to do so.

Second, because the trial judge report is used primarily for proportionality review, not for determining guilt or the sentence, and because Jeffries does not make a proportionality claim, he has suffered no prejudice by the use of the report. Even if the State Supreme Court uses this report to evaluate the evidence justifying the guilty verdict or to support the imposition of the death penalty, the entire trial record is available to fill in gaps that may exist in the report.

IV. *Prosecution by Indictment*

Jeffries argues that Washington's failure to prosecute this capital case by indictment violated his constitutional rights guaranteed by the Fifth, Eighth, and Fourteenth Amendments. Indictment by grand jury is not part of the due process guarantees of the Fourteenth Amendment that apply to state criminal defendants. *Hurtado v. California*, 110 U.S. 516 (1884), *recently affirmed by Rose v. Mitchell*, 443 U.S. 545, 557 n.7 (1979). This rule has been applied to Washington's state practice of prosecution by information. *Gaines v. Washington*, 277 U.S. 81 (1928). Accordingly, Jeffries' argument fails.

V. *Fair Trial*

Jeffries argues that his right to a fair trial was violated due to: (1) prejudicial media publicity; (2) juror misconduct; and (3) prosecutorial misconduct.

A. *Prejudicial Publicity*

Jeffries argues that he was denied a fair trial because the media publicity surrounding the trial prejudiced the jurors against him. He argues that the trial judge erred in failing to change the venue of the case.

The murders in this case occurred in Clallam County, Washington, population 50,000 (36,250 of whom were eligible for juror duty; 16,400 households). The *Port Angeles Daily*

News, a county newspaper with a circulation of about 13,000, provided primary coverage of the murders.

The murders were discovered on April 2, 1983. The *Daily News* ran nine stories on the murders between April 4 and April 19, as well as three more stories in the first two weeks of May. Both the *Seattle Post-Intelligencer* and the *Seattle Times* ran single articles regarding the murders shortly after their discovery. KOMO Television reported on the murder story for eight of the days between April 4 and 15. KING Television carried stories on April 4, 5, and 15.

The news coverage included: (1) details of Jeffries' Canadian criminal history; (2) the sheriff's statement that Jeffries was armed and dangerous and that the murders were premeditated; (3) details about the nature of the murders; (4) details of Jeffries' arrest; and (5) other details concerning the progress of the investigation.

Jury voir dire was conducted between October 3 and October 19.

On habeas review, this court must "make an independent review of the record to determine whether there was such a degree of prejudice against the petitioner that a fair trial was impossible." *Bashor v. Risley*, 730 F.2d 1228, 1234 (9th Cir.), *cert. denied*, 469 U.S. 838 (1984). This court must independently examine the news reports for volume, content, and

timing to determine if they were prejudicial. *Harris v. Pulley*, 885 F.2d 1354, 1360 (9th Cir. 1988). Whether a jury was biased in a question of fact. The trial judge's finding on this question is entitled to a presumption of correctness. *Lincoln v. Sunn*, 807 F.2d 805, 814-15 (9th Cir. 1987).

Defendants enjoy the right of due process to be tried by "a panel of impartial, 'indifferent' jurors." *Irvin v. Dowd*, 366 U.S. 717, 723 (1961). If prejudicial pretrial publicity makes it impossible to seat an impartial jury, then the trial judge must grant the defendant's motion for a change of venue. *Harris*, 885 F.2d at 1361. The prejudice requirement will be satisfied by a finding of: (1) presumed prejudice; or (2) actual prejudice.

1. *Presumed Prejudice*

"Prejudice is presumed when the record demonstrates that the community where the trial was held was saturated with prejudicial and inflammatory media publicity about the crime." *Harris*, 885 F.2d at 1361. Courts rarely find presumed prejudice because "saturation" defines conditions found only in extreme situations. *Id.*

We cannot presume prejudice in this case. We agree with the trial judge and the district court that the nature of the news coverage was factual, and not inflammatory. Moreover, although there was a substantial amount of publicity, the bulk of it occurred six months before jury selection in the case.

2. *Actual Prejudice*

Actual prejudice exists if the jurors demonstrated actual partiality or hostility that cannot be laid aside. *Harris*, 885 F.2d at 1363. "[J]urors need not, however, be totally ignorant of the facts and issues involved." *Murphy v. Florida*, 421 U.S. 794, 800 (1975).

We find no actual prejudice in this case. First, it is immaterial that almost all of the jurors had heard or read about the case prior to trial. All of these jurors swore under oath that they could impartially judge Jeffries' guilt or innocence.

Moreover, of the 180 venire members, at most 14 were excused, either for cause or peremptorily, because of potential prejudice. Excusing 14 out of 180 venire members for prejudice does not indicate actual prejudice of jurors. *See Murphy*, 421 U.S. at 803 (no prejudice found where 20 out of 78 venire members excused due to partiality). Jeffries points to no aspect of the five volume voir dire transcript in arguing that actual prejudice existed.

B. *Juror Misconduct*

Jeffries argues that he was denied a fair trial because one of the jurors in the case informed the other jurors that Jeffries was a convicted armed robber. The trial judge had excluded evidence of Jeffries' prior convictions during the guilt and penalty phases of the trial.

Two years after Jeffries was sentenced, two jurors filed affidavits concerning juror conduct during the trial. In his affidavit, juror Thomas Tyszko stated that, during the guilt phase, juror Erin Thomas announced to the jury that "Jeffries is a convicted armed robber . . . oh we're not supposed to know that are we?" Tyszko stated that he had ignored the comment.

In her affidavit, juror Kathleen Sims claimed that, during the penalty phase, Thomas told the jury that Jeffries "had a record." Sims stated that someone, perhaps herself, responded that Jeffries' criminal record was irrelevant.

Thomas denied making the statements or even that he had heard Jeffries had a record. Eight of the twelve jurors swore that they did not hear anyone refer to Jeffries' criminal record or make such statements themselves.

In assessing whether the alleged juror misconduct deprived Jeffries of a fair trial, the district court properly invoked the five-part test set out in *Bayramoglu v. Estelle*, 806 F.2d 880, 887 (9th Cir. 1986). In *Bayramoglu*, we held that the following factors are relevant in determining whether the alleged introduction of extrinsic evidence constitutes reversible error:

> (1) whether the extrinsic material was actually received, and if so, how; (2) the length of time it was available to the jury; (3) the extent to which the jury discussed and considered it; (4) whether the material was introduced before a verdict was reached, and if so, at what point in the deliberations it was introduced; and (5) any

other matters which may bear on the issue of the reasonable possibility of whether the introduction of extrinsic material affected the verdict.

Id. While instructive, none of the factors should be considered dispositive. *Dickson v. Sullivan*, 849 F.2d 403, 406 (9th Cir. 1988). The ultimate question is "whether it can be concluded beyond a reasonable doubt that extrinsic evidence did not contribute to the verdict." *Bayramoglu*, 806 F.2d at 887 (internal quotations omitted).[1]

The Supreme Court, however, has recently invoked a less stringent harmless error standard on collateral review. *Brecht v. Abrahamson*, 113 S. Ct. 1710 (1993). To obtain relief, petitioners must now show that the alleged error "'had substantial and injurious effect or influence in determining the jury's verdict.'" *Id*; at 1722 (quoting *Kotteakos v. United States*, 328 U.S. 750, 776 (1946)). Although petitioners now face a greater burden, it would be wrong to assume that federal collateral review has lost much of its force. It is therefore important in applying the new harmless error standard to abide by the cautionary words of the *Kotteakos* Court:

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[1]An alternative and equivalent articulation of this test is whether there is a 'reasonable possibility' that the extraneous material could have affected the verdict. *United States v. Navarro-Garcia*, 926 F.2d 818, 821 (9th Cir. 1991).

> The inquiry cannot be merely whether there was enough to support the result, apart from the phase affected by the error. It is rather, even so, whether the error itself had substantial influence. If so, or if one is left in grave doubt, the conviction cannot stand.

Kotteakos, 328 U.S. at 765.

In determining whether the alleged juror misconduct had a "substantial influence" on the verdict, we turn to *Dickson v. Sullivan*, 849 F.2d 403 (9th Cir. 1988), a case which presented facts very similar to ours. There, we granted habeas relief where two jurors were exposed to an out-of-court communication by a deputy sheriff to the effect that Dickson "had done something like this before." In reaching this result, we emphasized the significance of the nature of the extrinsic information received by the jury in evaluating its potential impact on the verdict. *Id.* at 406-07. Here, as in *Dickson*, the extrinsic information was "both directly related to a material issue in the case and highly inflammatory." *Id.* at 407.[2]

Jeffries was convicted and sentenced to death on the basis of two special findings: murder to conceal the commission

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[2]The fact that the extrinsic information came from a juror's personal knowledge rather than from an outside source has no bearing on our analysis. We have previously recognized that a juror's personal knowledge of information concerning the defendant or the defendant's alleged crime constitutes impermissible extrinsic evidence. *United States v. Navarro-Garcia*, 926 F.2d 818, 821 (9th Cir. 1991); *see also United States v. Howard*, 506 F.2d 865, 867 (5th Cir. 1975).

of the crime of robbery and murder as part of the common scheme or plan to rob. Against this backdrop, we find extrajudicial knowledge of Jeffries' prior conviction for armed robbery to be especially harmful. Where the extrinsic evidence concerns a prior conviction similar to the charge at issues, "there is a substantial risk that all exculpatory evidence will be overwhelmed by a jury's fixation on the human tendency to draw a conclusion which is impermissible in law: because he did it before, he must have done it again." *United States v. Bagley*, 772 F.2d 482, 488 (9th Cir.), *cert. denied*, 475 U.S. 1023 (1986).

The potential for prejudice under these circumstances was recognized in *Dickson*, but overlooked by the district court in this case. Moreover, the district court erroneously applied *Bayramoglu* by finding most important "the fact that even those jurors who actually heard the remark have repeatedly stated it was not a factor in reaching their decision." Testimony as to the subjective effects of extraneous information is outside the relevant scope of inquiry of a reviewing court. *United States v. Bagnariol*, 665 F.2d 877 (9th Cir. 1981) (Fed. R. Evid. 606(b) bars consideration of evidence concerning the impact of extrinsic information on the deliberative process). "Rather, the trial court's factual inquiry is limited to determining the extent, if at all, to which jurors saw or discussed the extrinsic evidence."

Dickson, 849 F.2d at 406. The district court should instead have applied an objective test in evaluating the potential impact of the extrinsic evidence on the verdict, keeping in mind the "highly inflammatory" effect that knowledge of substantially similar prior bad acts has upon the jury. *Id.* at 406-07.

In *Dickson*, we found it "impossible" to conclude that exposure of one or more jurors to highly prejudicial information regarding the defendant's prior criminal acts was harmless beyond a reasonable doubt. *Id.* at 408. The serious concerns that motivated us to grant habeas relief in this case are likewise present here and lead us to the same result even under the *Kotteakos* harmless error standard. Because we conclude that extrinsic information of the nature alleged to have been communicated here, if true, would have had a "substantial and injurious effect or influence" on the verdict, we vacate the grant of summary judgment, and remand for a factual determination as to the truth of the affidavits.

C. *Prosecutorial Misconduct*

Jeffries argues that a number of statements made by the prosecutor to the jury during closing argument deprived him of a fair trial.

We review remarks by the prosecution in a capital case to determine if they rendered the proceedings fundamentally unfair. Improper argument does not, per se, violate a

defendant's constitutional rights. *Darden v. Wainwright*, 477 U.S. 168, 181 (1986); *Campbell v. Kincheloe*, 829 F.2d 1453, 1457 (9th Cir. 1987), *cert. denied*, 488 U.S. 948 (1988). Moreover, we review for plain error prosecutorial comments to which a defendant fails to object. *United States v. Endicott*, 803 F.2d 506, 513 (9th Cir. 1986).

1. *Comment on Jeffries' Right to Remain Silent*

Washington state law provides a right of allocution to the defendant to make a statement during the closing arguments which is not subject to direct or cross-examination. Wash. State Sup. Ct. Crim. R. 7.1(a)(1). Jeffries exercised this right and indicated that he was not guilty of these murders and refused to beg for mercy for crimes he did not commit. In response, the prosecution said in his closing argument:

> Well, you have heard the defendant in a situation where de does not have to take an oath and in a situation that I can't cross-examine him, and his statement, I submit, is one that is insulting to the intelligence. It is also a statement, I think, full of arrogance.

Defense counsel did not object to this statement and did not offer a curative instruction in response.

The Fifth Amendment prohibits the prosecutor from commenting to the jury on the defendant's failure to take the stand in his own defense. *Griffin v. California*, 380 U.S. 609, 615 (1965). However, such commentary mandates reversal only

if: (1) the commentary is extensive; (2) an inference of guilt from silence is stressed to the jury as a basis for the conviction; and (3) where there is evidence that could have supported acquittal. *Lincoln v. Sunn*, 807 F.2d 805, 809 (9th Cir. 1987).

The comment in this case does not create error, must less constitutional error. We agree with the Washington State supreme Court that the comment constituted, at worst, a rebuttal of Jeffries' contention that he was telling the truth. *See Jeffries I*, 717 P.2d at 722. Moreover, the comment was a single, isolated incident rather than an extensive tactic by the prosecution.

2. *Caldwell Claim and Eye for an Eye*

In his closing argument, the prosecutor said:

> Phil Skiff and Inez Skiff didn't get due process of law. This man got a fair trial. He got two attorneys. He got resources, he got the benefit, everything that our system gives to a defendant, everything, and he got a fair trial and he will get more than that. *He will get appeals*, you name it, because that is our system and this system has treated him fairly. Something that he didn't do -- he killed unmercifully, but our system gives him due process of law so don't think that you're killing him because you're giving him the law and you're giving him justice.

Jeffries argues that, in making this statement, the prosecutor impermissibly led the jury to believe that the responsibility for imposing the death sentence did not lie with

them. Jeffries relies on *Caldwell v. Mississippi*, 472 U.S. 320 (1985). Moreover, Jeffries argues that the statement constituted an impermissible "eye for an eye" argument.

Jeffries' arguments are not persuasive. The prosecutor's passing reference to Jeffries' right to appeal did not indicate to the jury that it was relieved of its responsibility for determining the appropriateness of the death penalty. Jurors know that cases can be appealed. Moreover, the penalty phase instruction made clear to the jury that the responsibility lay with it. Finally, the statement does not suggest that the jury ignore its legal responsibility impartially to weigh all of the evidence and to impose a death sentence as a matter of retribution.

3. *Prosecutor's Opinion as to Guilt*

Finally, Jeffries argues that the prosecutor improperly informed the jury of his personal opinion as to Jeffries' guilt. After the jury had returned a guilty verdict in which it found the presence of two aggravating circumstances, the prosecutor told the jury: "Well, ladies and gentlemen, you did the right thing. You did the right thing . . . ." Because the prosecutor made his statement after the jury returned its verdict, the statement could not have affected the jury's decision. The statement did not render the trial fundamentally unfair. *See United States v. Gwaltney*, 790 F.2d 1378, 1383 (9th Cir. 1986) *cert. denied*, 479 U.S. 1104 (1987).

VI. *Evidentiary Claims*

Jeffries argues that certain evidentiary errors made by the trial judge warrant reversal.

Federal habeas will not lie for errors of state law. *Estelle v. McGuire*, ___ U.S. ___, 112 S.Ct. 475, 480 (1991). Habeas relief is available for wrongly admitted evidence only when the questioned evidence renders the trial so fundamentally unfair as to violate federal due process. *Id.*; *Butcher v. Marquez*, 758 F.2d 373, 378 (9th Cir. 1985).

A. *Jeffries' Previous Imprisonment*

Jeffries argues that his trial was rendered fundamentally unfair when a prosecution witness referred to Jeffries' prior history of imprisonment in Canada. When asked by the prosecution when he had first heard of Jeffries, the witness responded: "It was when I met Phil and Inez in Chilliwack that he [Jeffries] used to do carving and things like that when he was in jail somewhere in Canada." Finding that the response was inadvertent and had not been intentionally elicited by the prosecutor, the trial judge denied the defense motion for a mistrial. The judge directed the jury to disregard the prosecutor's question and the witness' response.

We do not believe that the above testimony rendered Jeffries' trial fundamentally unfair. First, the statement was inadvertent and not a prosecutorial attempt to elicit otherwise

inadmissible evidence. Moreover, the trial court's remedial instruction to the jury cured any possible prejudice caused by the incident.

B. *Weapons Evidence*

Jeffries argues that the admission of evidence related to weapons possession was contrary to a Washington state rule of evidence and violated his due process rights. At trial, the trial judge allowed the prosecution to introduce evidence showing that Jeffries had been seen with certain rifles, bullets, and handguns. Jeffries argues that this evidence constituted, under Washington law, impermissible character evidence and that its introduction rendered his trial fundamentally unfair.

Jeffries' assertions of state law error are not cognizable on federal habeas. *McGuire*, ___ U.S. at ___, 112 S.Ct. at 480. Moreover, Jeffries' arguments do not establish fundamental unfairness. The evidence of which Jeffries complains was related to the crimes for which he was being prosecuted. According to the Washington State Supreme Court, the .22 caliber rifle and bullets had been stolen from the victims, the pistols could have been the murder weapon or weapons, and the FBI had determined that the bullets could have come from the same boxes of .22 caliber bullets recovered from Jeffries' stash. *Jeffries I*, 717 P.2d at 731. These determinations are fairly

supported by the record and thus warrant a presumption of correctness.

VII. *Aggravating Circumstances*

Jeffries makes a number of arguments related to the two aggravating circumstances which were found to exist in his case. The two aggravating circumstances are:

> (7) The defendant committed the murder to conceal the commission of a crime or to protect or conceal the identity of any person committing a crime.
>
> (8) There was more than one victim and the murders were part of a common scheme or plan or the result of a single act of the defendant.

Wash. Rev. Code §§ 10.95.020(7), (8).

Jeffries' aggravating circumstances claims address: (1) the sufficiency of the evidence; (2) the definitions of the circumstances; and (3) juror unanimity.

A. *Sufficiency of the Evidence*

Jeffries argues that the evidence in the case as insufficient to establish the existence of either aggravating circumstance. He argues that circumstance (7) requires a finding that the defendant contemplated the commission of a crime prior to committing the murders. Because, Jeffries contends, the trial produced no evidence concerning his motives prior to the killings, circumstance (7) could not have been made out. Similarly, with respect to circumstance (8), Jeffries argues that

no evidence demonstrated that he had conceived of some plan concerning the murders prior to their commission.

Evidence supporting aggravating circumstances findings is sufficient if "'viewing the evidence in a light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.'" *Lewis v. Jeffers*, 497 U.S. 764, ___, 110 S.Ct. 3092, 3103-04 (1990) (quoting *Jackson v. Virginia*, 443 U.S. 307, 319 (1979)).

At bottom, Jeffries is arguing that aggravating circumstance (7) and (8) cannot be proven by the use of circumstantial evidence. This assertion is incorrect. *See United States v. Hernandez*, 876 F.2d 774, 777 (9th Cir.), *cert. denied*, 493 U.S. 863 (1989). Sufficient circumstantial evidence exists for a rational jury to find beyond a reasonable doubt that Jeffries had killed the Skiffs to facilitate robbing them. Evidence introduced at trial showed, *inter alia*, that: (1) Phil Skiff had been shot twice in the back of the head "gangland style" and five times in the body; (2) after the murders, Jeffries tried to sell the Skiffs' T.V. and some placer gold; (3) Jeffries was seen flashing large amounts of Canadian money after the murders -- Inez Skiff had withdrawn $30,000 in Canadian currency shortly before her murder and that money has never been recovered; and (4) shortly after the murders, Jeffries left the victims' home with their truck, chain saw, T.V., guns, and other items.

B. *Definitions of the elements*

Jeffries makes two arguments concerning the elements which make up aggravating circumstances (7) and (8). First, Jeffries contends that these circumstances contain the following elements: (1) a particular crime that was being concealed; (2) a particular plan or scheme; and (3) a specific mental state with respect to the circumstances. Jeffries argues that the trial judge erred in failing to instruct the jury as to the particular crime he was concealing, the plan he was acting in accordance with, and the mens rea with which he concealed a crime or hatched the plan.

The problem with this argument with respect to items (1) and (2) is that these items are not elements of circumstances (7) and (8) as defined by the Washington Supreme Court. The prosecution need prove only those elements of the crime which are included in the definition of the offense. *Patterson v. New York*, 432 U.S. 197, 210-211 (1977). In *Jeffries I*, the Washington Supreme Court made clear that, with respect to circumstance (7), "[t]he specific crime need not be stated." *Jeffries I*, 717 P.2d at 735. similarly, the "common scheme or plan" from circumstance (8) is "simplistic" and "needs no definition." *Id*. Because it is the sole responsibility of the States to define the elements of their criminal offenses, *see, e.g., Martin v. Ohio*, 480 U.S. 228, 232 (1987), Jeffries' first

argument fails with respect to the definition of "crime" and "plan or scheme."

Concerning item (3), the mens rea requirement, the Washington Supreme Court has found that "[i]t is impossible for a jury to find both aggravating circumstances without also finding that the defendant intended to commit them." *Jeffries I*, 717 P.2d at 735. This is true with respect to killing in order to conceal a crime and killing as part of a plan or scheme. Both presuppose some purpose on the part of the defendant. Accordingly, no special instruction was necessary to indicate the mens rea requirements of the circumstances as they applied in this case.

Second, Jeffries seems to argue that the terms "crime" and "plan or scheme" are unconstitutionally vague. According to the Supreme Court, capital sentencing schemes must not contain vague elements. Capital sentencing standards must provide a meaningful basis for distinguishing between those cases in which the death penalty is appropriate and those in which it is not. *Godfrey v. Georgia*, 446 U.S. 420 (1980). Under the teaching of *Godfrey*, the phrases "crime" and "plan or scheme," are not unconstitutionally vague. 446 U.S. at 427-28.

C. *Juror Unanimity*

Jeffries makes two arguments that the trial judge erred in failing to give specific unanimity instructions to the jury.

First, concerning the guilt phase, Jeffries argues that the judge should have given a specific unanimity instruction as to each element of the aggravating circumstances charged. Because the judge failed to do so, Jeffries contends it is possible that the jurors disagreed as to what crime he was concealing in murdering the Skiffs, or the common plan or scheme under which he was acting.

Jeffries also argues that the trial judge should have given the jury a separate, specific unanimity instruction for each murder count. In other words, the judge should have told the jury that it must be unanimous as to the sentence of death for each murder. At trial, the judge submitted to the jury only one verdict form for both counts, rather than one for each.

A faulty jury instruction will constitute a violation of due process only where the instruction by itself infects the entire trial to such an extent that the resulting conviction violates due process. *Cupp v. Naughten*, 414 U.S. 141, 147 (1973). Where the alleged error is the failure to give an instruction the burden on the petitioner is "especially heavy." *Henderson v. Kibbe*, 431 U.S. 145, 155 (1977).

With regard to juror unanimity, a general unanimity instruction will normally suffice to instruct the jury that they must be unanimous as to the elements which form the basis of the conviction. *United States v. Pavseno*, 782 F.2d 832, 835

(9th Cir. 1986). The exception to the general rule involves situations in which "there is a genuine possibility of jury confusion or that conviction may result from different jurors concluding that the defendant committed different acts." *United States v. Echeverry*, 719 F.2d 974, 975 (9th Cir. 1983). Juror confusion is often a genuine possibility when the nature of the evidence is complex, when there is a discrepancy between the evidence and the indictment, or some other particular factor creates such a possibility of confusion. *United States v. Frazin*, 780 F.2d 1461, 1468 (9th Cir.), *cert. denied*, 479 U.S. 844 (1986).

Concerning Jeffries' first argument, none of the normal indicia of juror confusion are present. This case involved straightforward facts regarding the murders and did not include complicated legal theories or varied facts regarding different times, places, or personalities. *See Payseno*, 782 F.2d at 837. Moreover, it is irrelevant whether the jurors agreed upon the underlying "crime" or "scheme" as being murder or theft. Under the Washington statute, the specific crime is not an element that needs to be proved beyond a reasonable doubt. *Jeffries I*, 717 P.2d at 735. The findings of a crime or scheme are merely alternative means of finding aggravated first degree murder. *See Schad v. Arizona*, ___ U.S. ___, ___, 111 S.Ct. 2491, 2501 (1991). Thus, the jury need only unanimously agree

that the murder was committed to conceal *some* crime or as part of *some* common scheme or plan. The special verdict form indicates that the jurors were unanimous as to these specifics of the crime.

Jeffries' second argument, concerning juror unanimity as the sentencing phase, is also without merit. As the Washington Supreme Court noted in *Jeffries I*, "[i]n a capital case, the jury is to consider not each count separately but all crimes the defendant has been convicted of in deciding whether death is the appropriate punishment." *Id.* at 735. Jurors in Washington are not required to be unanimous as to the appropriateness of the death penalty for each murder in a multiple-murder trial. They need only be unanimous that the penalty is appropriate because of all of the defendant's crimes. The jury was unanimous on every material question.

VIII. *Mitigating Circumstances*

Jeffries argues that a number of sentencing phase jury instructions prevented the jury from properly considering mitigating evidence. Jeffries also argues that the jury should have been required to specify the mitigating factors it found in his case and the weights which the jury assigned to them.

A faulty jury instruction will require the grant of a habeas petition only if the instruction by itself so infected the entire trial that the resulting conviction violates due process.

McGuire, ___ U.S. at ___, 112 S.Ct. at 482. The instruction "'may not be judged in artificial isolation, ' but must be considered in the context of the instructions as a whole and the trial record." *Id.* (Quoting *Cupp v. Naughton*, 414 U.S. 141, 147 (1973)). An ambiguous instruction is reviewed to determine whether there is a reasonable likelihood that the jury has applied the challenged instruction in a way that prevents the consideration of constitutionally relevant evidence. *Id.; Boyde v. California*, 494 U.S. 370, 381 (1990).

A. *Multiple Circumstances and "Having in Mind the Crime"*

Jeffries makes two arguments that a particular jury instruction and verdict form were defective because they hindered the jury from performing its proper function with respect to the determination of mitigating circumstances.

The Challenged instruction reads:

> Having in mind the crime of which the defendant has been found guilty, are you convinced beyond a reasonable doubt that there are not sufficient mitigating *circumstances* to merit leniency?

The verdict form reads:

> During the special sentencing proceedings, the State bears the burden of proving beyond a reasonable doubt that there are not sufficient mitigating *circumstances* to merit leniency.

Jeffries first argues that the instruction and verdict form prevented the jury from considering a single mitigating circumstance; that they required the jury to find multiple circumstances or none at all. Second, Jeffries argues that the "having in mind the crime" language prevented the jury from making an individualized determination of the appropriateness of the death penalty.

A sentencer may not be precluded from considering relevant factors in mitigation of the death penalty. *Lockett v. Ohio*, 438 U.S. 586, 604 (1978).

Concerning Jeffries' first argument, the instructions and verdict form to which Jeffries points cannot plausibly be read as precluding the jury from considering a relevant mitigating circumstance should it find only one. This is especially evident given that the jury began it analysis with a presumption of leniency, Wash. Rev. Code § 10.95, and that the jury was instructed as to the definition of only one mitigating circumstance.

As for Jeffries' second argument, the instruction cannot be read to prevent individualized analysis when the instruction is read in the context of the other instructions. One instruction told the jury to consider "any relevant factors" -- this includes all evidence in mitigation. Another instruction defined a mitigating circumstance as "a fact about the offense, *or about the*

defendant, ... " Thus, reading the sentencing instructions as a whole, *Boyde*, 494 U.S. at 383, 110 S.Ct. at 1199 (emphasis added), the jury was not precluded from considering any mitigating evidence.

B. *"Any Relevant Factors"*

Jeffries argues that a jury instruction permitting the jury to consider "any relevant factors" rather than any "mitigating factors" is ambiguous and thus prevented the jury from making an individualized assessment of the appropriateness of the death penalty. We disagree. The instruction is not ambiguous when read in context. The instructions as a whole, including the definition of a "mitigating circumstance," were adequate to guide the jury. Moreover, it is significant that it was at the request of the defendant that the trial court did not provide the jury with the list of statutory examples of relevant factors. There was no error.

C. *Failure to Articulate Mitigating Circumstances*

Jeffries argues that the jury should have been required to specify the mitigating factors and the corresponding weight that it assigned the factors in the sentencing balance. Jeffries cites *Smith v. McCormick*, 914 F.2d 1153, 1166 (9th Cir. 1990) for the proposition that the jury must make specific findings as to all relevant mitigating circumstances, including those it finds insufficient to merit leniency. However, in *Smith* there was a

specific state statute requiring the sentencing judge to make written findings as to the weight of the mitigation evidence. *Id.* No such state statute operates in Washington. *Clark v. Ricketts*, 942 F.2d 567, 574 n.5 (9th Cir. 1991), *amended on other grounds*, 958 F.2d 851 (1992), *petition for cert. filed*, May 18, 1992. Therefore, the rationale of *Smith* does not apply to this case.

Furthermore, due process does not require that the sentencer exhaustively document its analysis of each mitigating factor as long as a reviewing federal court can discern from the record that the state court did indeed consider all mitigating evidence offered by the defendant. *Parker v. Dugger*, ___ U.S. ___, 111 S.Ct. 731, 736-38 (1991); *Clark*, 942 F.2d at 574. Jeffries contends that there is a *Lockett* concern, 438 U.S. at 604, that the jury may have ignored relevant mitigating evidence. However, it is clear from the record what factors the jury considered in its calculus in Jeffries' case. *See Parker*, 111 S.Ct. at 736 (assume trial judge considered all evidence because he said he did); *Clark*, 942 F.2d at 575 (statements of sentencing court that it considered all mitigating evidence satisfy demands of due process clause). The defense offered only one mitigating factor -- artistic ability as evidenced by sculptures Jeffries had created. The special sentencing verdict form indicated that the jury found the presence of two specific aggravating

circumstances, a murder committed during the commission of a crime and murder as part of a common scheme. The statements of the jury, i.e., the special verdict form and sentence of death, read in light of the record, show that the jury considered all mitigating evidence. This process satisfies the demands of the due process clause.

IX. *Ineffective Assistance of Counsel*

Finally, Jeffries argues that his counsel's representation of him was unconstitutionally defective. At trial, Jeffries persuaded his attorneys not to present any mitigating evidence. Jeffries first argues that his counsel's acquiescence in his request denied him the effective assistance of counsel. Second, Jeffries maintains that his decision not to present mitigating evidence amounted to a waiver of counsel and that the trial judge did not properly accept this waiver. Finally, Jeffries argues that his counsel failed adequately to investigate evidence in mitigation.

A. *Counsel's Acquiescence*

Jeffries argues that his counsel's acquiescence in his "unknowing and uninformed" decision not to present any mitigating evidence constituted defective performance. Defense counsel had been prepared to present a mitigation case. However, Jeffries, after a weekend of discussions with his brother and with counsel, decided not to present any witnesses

in mitigation. Jeffries repeatedly stated the reasons for his decision:

> I still stand that I am innocent and I believe it and I have no reason to even ask God's forgiveness because I have done nothing and I certainly don't see any reason to beg for the jury or anybody else because I am innocent and that is how I stand and therefore I don't want to put my loved ones, like my relatives and friends, bring them up here and put them through this when I believe strongly that there is not valid reason to do so.

Counsel for Jeffries told the court:

> Mr. Sowa and myself both believe that our client is perfectly competent and that [it] is his personal decision after a weekend of soul searching, which has caused him to elect this course of actions. While we may not join in it, we believe that the decision is personal enough and made knowingly, voluntarily and intelligently that, as his counsel, we have no choice but to adhere to his wishes.

At sentencing the only mitigation evidence offered was the limited testimony of Jeffries' brother regarding the artistic value of Jeffries' wood sculptures.

To succeed on an ineffective assistance of counsel claim, the petitioner must demonstrate that counsel's performance was so deficient that it fell below an objective standard of reasonableness, and that the deficient performance prejudiced the defense. *Strickland v. Washington*, 466 U.S. 668, 687 (1984).

There exists a strong presumption that defense counsel's actions were reasonable and provided constitutionally adequate assistance. *Id.* at 689.

Jeffries' counsel did not render him inadequate assistance. First, Jeffries' decision not to present evidence in mitigation was informed and knowing. His own consistent words and those of his counsel support this conclusion. His unsworn denial of the crimes during his statutory allocution made his refusal to seek mitigation a logical strategy.

Second, counsel's acquiescence in this decision did not constitute deficient performance. Although the ABA Standards for Criminal Justice (2d ed. 1980) offers some support to Jeffries' contention that his counsel should have presented evidence in mitigation despite his client's wishes to the contrary, the ABA Standards serve only as a "guide" for determining whether an attorney's performance is adequate. *Strickland*, 466 U.S. at 688; *Jones v. Barnes*, 463 U.S. 745, 753 n.6 (1983). As the Supreme Court has recognized, "[t]he reasonableness of counsel's actions may be determined or substantially influenced by the defendant's own statements or actions." *Strickland*, 466 U.S. at 691. "Counsel's actions are usually based, quite properly, on informed strategic choices made by the defendant and on information supplied by the defendant." *Id.* Indeed, the Eleventh Circuit has held that "when a defendant preempts his

attorney's strategy by insisting that a different defense be followed, no claim of ineffectiveness can be made." *Mitchell v. Kemp*, 762 F.2d 886, 889 (11th Cir. 1985), *cert. denied*, 483 U.S. 1026 (1987).

In this case, counsel for Jeffries had been prepared to present evidence in mitigation and had discussed with Jeffries the ramifications of failing to present the evidence. Accordingly, counsel did not deprive Jeffries of effective assistance in acquiescing in the latter's considered decision.

B. *Waiver of the Right to Counsel*

Also concerning his decision to refrain from presenting evidence in mitigation, Jeffries argues that this decision constituted a waiver of counsel and that the trial court erred in failing to verify that the waiver was knowingly and voluntarily made. Jeffries' argument fails because he did not waive his right to counsel. Jeffries merely participated in the direction of his own defense. *See State v. Jones*, 99 Wash.2d 735, 664 P.2d 1216 (1983). Even if the decision could be construed as a waiver, the facts of this case demonstrate that the waiver was knowingly and voluntarily made.

C. *Failure to Investigate*

Jeffries argues that his counsel failed to investigate mitigating evidence. This argument is belied by the record. Counsel had been prepared to offer the testimony of several

witnesses, including Jeffries' brother, two of his nieces, and his Canadian parole officer to show Jeffries' prior nonviolent character, difficult childhood, drug problems, and social value of his artwork. Counsel performed well in the face of a difficult client and overwhelming evidence in the prosecution's case.

The judgement of the district court is vacated and the cause is remanded to the District Court for further proceedings on the question of juror misconduct in light of *Dickson v. Sullivan, supra*. In all other respects, the findings and conclusions of the district court are free from reversible error.

VACATED and REMANDED.

FERNANDEZ, concurring with and dissenting to opinion:

I concur in the opinion except as to the part regarding jury misconduct. Part V., B. and the concluding paragraph. As to that, I dissent.

The question with which we are presented is a narrow one: if a juror has heard an assertion that a person on trial for murder and robbery was previously convicted of armed robbery, is that juror so tainted that the verdict must be overturned? Our dispute is similarly narrow, but exceedingly important. The majority, relying on *Dickson* and on its own independent reasoning, says that the answer is "yes" and when faced with those two facts sweeps away all other considerations. I say, not

necessarily, and that we must still decide whether there *was* an effect on the verdict under all of the circumstances of this case.

The majority opinion underscores the fears that I have expressed in a dissent to its earlier order granting reconsideration. Slip op. 1841 at 1844-45 (9th Cir. March 3, 1993). If certain comments were merely made by a juror, an almost 10 year old conviction for two vicious murders will be set aside. That, to my mind, is a travesty.

[FILED]
[September 5, 1991]

APPENDIX B

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

CASE NO. C90-925D

ORDER

PATRICK JAMES JEFFRIES,

Petitioner,

v.

JAMES BLODGETT,

Respondent.

THIS MATTER comes before the Court on the motion of respondent James Blodgett for summary judgment. The underlying action is a petition for a writ of habeas corpus filed by Patrick James Jeffries.

Jeffries contends that his custody and sentence of death are contrary to the Constitution of the United States. The Court has considered each of the eighteen claims raised in the petition and finds them without merit. The Court therefore grants respondent's motion for summary judgment, denies the petition for a writ of habeas corpus, and dissolves its previously entered stay of execution.

PROCEDURAL BACKGROUND

A jury found petitioner Jeffries guilty of two counts of aggravated first degree murder on November 5, 1983. The jury also returned a special verdict finding that the state had proven two aggravating factors beyond a reasonable doubt. The aggravating circumstances were: (1) that the murder had been committed to conceal the commission of a crime or to protect or conceal the identity a person committing a crime, and (2) that the murders were part of a common scheme or plan or the result of a single act of the defendant.

A special sentencing proceeding (the "penalty phase") to determine whether the death penalty should be imposed was conducted on November 7, 1983. The jury returned a verdict that there were not sufficient mitigating circumstances to merit leniency. Jeffries was sentenced to death by the Honorable Grant Meiner on November 18, 1983.

Both the guilt and penalty phase of the trial were conducted in Clallam County Superior Court. Petitioner was represented by Walter Sowa and Mark Mestel. The prosecuting attorney was David Bruneau.

Jeffries' direct appeal to the Washington Supreme Court was denied on March 26, 1986. *State v. Jeffries*, 105 Wn.2d 398 (1986) ("*Jeffries I*"). A motion for reconsideration was denied by order dated June 3, 1986. Jeffries' application to the

United States Supreme Court for a writ of certiorari was denied. Jeffries was represented by Brian Phillips on appeal. The state was represented by Bruneau and Christopher Melly.

A death warrant was issued by Judge Meiner and stayed by the Washington Supreme Court. Jeffries then filed a personal restraint petition with the Washington Supreme Court on December 18, 1985. The petition was rejected by the Washington Supreme Court on July 25, 1986 in an opinion not reported in the Washington Reports. *In re Jeffries*, 722 P.2d 99 (1986) ("*Jeffries II*").

Jeffries' second personal restraint petition was argued to the Washington Supreme Court on September 15, 1987. The Washington Supreme Court denied this petition on April 7, 1988. *In re Jeffries*, 110 Wn.2d 326 (1988) ("*Jeffries III*"). The Washington Supreme Court stayed its mandate for the decision in *Jeffries III* pending a petition for certiorari to the United States Supreme Court. The petition for certiorari was denied.

On March 21, 1989, Jeffries applied for a stay of execution and a petition for writ of habeas corpus in the United States District Court for the Western District of Washington. The case was assigned to this Court (Judge Dimmick) and a hearing was held on March 23, 1989. Jeffries was represented by Brian Phillips and Stephanie Ross. Respondent was represented by Kenneth Eikenberry (Attorney General), Linda

Dalton, and John Jones. The Court entered an order granting a stay of execution on March 23, 1989.

Respondent filed a motion to dismiss for failure to exhaust state court remedies on April 21, 1989. Subsequently, Jeffries filed a third personal restraint petition with the Washington Supreme Court on May 12, 1989. On June 1, 1989, the Court dismissed the habeas corpus petition without prejudice and dissolved the stay of execution. Jeffries' third personal restrain petition was considered by the Washington Supreme Court at an en banc administrative conference on November 30, 1989. The petition was denied on April 5, 1990. *In re Jeffries*, 114 Wn.2d 485 (1990) ("*Jeffries IV*").

A death warrant was issued on May 24, 1990 by the Clallam County Superior Court. Jeffries filed a petition for writ of habeas corpus on July 12, 1990 in the United States District Court for the Western District of Washington. The petition was again assigned to this Court. Brian Phillips and Stephanie Ross were appointed by the Court to represent Jeffries. Respondent was represented by Kenneth Eikenberry, Linda Dalton, and Paul Weisser. After a hearing on July 6, 1990, the Court entered an order staying execution.

On July 20, 1990, respondent filed a motion to dismiss for failure to exhaust state remedies. After setting a briefing schedule on this motion, the Court heard oral argument on

September 10, 1990. At the hearing Jeffries agreed to file an amended petition for a writ of habeas corpus, deleting those claims that had not been properly presented to the state courts. The amended petition was filed on September 18, 1990. A briefing schedule for respondent's dispositive motion was established on October 19, 1990.

Respondent filed the instant motion for summary judgment on November 9, 1990.

Jeffries filed a motion to compel answers to admit or deny each allegation of the amended petition and a motion for an extension of time for filing a response to the motion for summary judgment on December 13, 1990. On December 26, 1990, the Court denied Jeffries' motion to compel, finding that respondent had adequately complied with Rules 4 and 5 of the Rules Governing Section 2254 Cases. The Court granted Jeffries a one-month extension in which to file his response.

On January 25, 1991, Jeffries filed the following motions: (1) for discovery, (2) for expansion of the state court record, and (3) for an evidentiary hearing. On April 4, 1991, the Court heard oral argument on these three motions and on the "procedural bar" issue raised in the motion for summary judgment.

On April 15, 1991, the Court ruled that the procedural bar doctrine does not require the dismissal of claims 6.5, 6.6,

7.1, 7.2 and 7.7 of the amended petition for a writ of habeas corpus. The court ordered an evidentiary hearing on claims 6.1, 6.5, 6.6, 6.7, 7.6, 7.7 and 7.10. The Court declined to further expand the state court record. The parties were instructed to file an outline of the pre-hearing discovery that they intended to conduct.

By order dated May 20, 1991, the Court resolved several disputes that had arisen between the parties concerning the scope of the discovery being conducted in preparation for the evidentiary hearing. By order dated June 11, 1991, the Court permitted counsel for the respondent to depose Jeffries (with certain restrictions) as well as Jeffries' original trial counsel. Respondent's request for production of trial counsel's entire work file was denied.

On June 26, 1991, an evidentiary hearing was held at which both petitioner and respondent had an opportunity to submit evidence on the following claims: failure to change venue/jury misconduct (6.1); newly discovered evidence (6.5); prejudicial testimony -- petitioner in jail (6.6); weapons unrelated to charged offense (6.7); ineffective assistance of counsel (7.6); waiver of right to counsel (7.7); trial judge report (7.10). Petitioner Jeffries was present at the evidentiary hearing, but did not testify. The hearing lasted for two days.

At the conclusion of the evidentiary hearing, the Court ruled on certain oral motions that had been made by the parties. These rulings were memorialized in an order dated June 27, 1991. Respondent's request for reconsideration of the procedural bar question was denied. Petitioner's request for an opportunity to conduct a mental health exam to determine his mental state at the time of the penalty phase of the trial was denied. Petitioner's request to introduce the testimony of certain experts on the duty of counsel to present mitigating evidence and as an aid in determining the likely jury interpretation of certain jury instructions was also denied. Finally, a date for oral argument on the summary judgment motion was established, as well as deadlines for supplementing the testimony of the evidentiary hearing (a procedure which had been agreed to by the parties) and for filing post-hearing briefs.

Oral argument on respondent's motion for summary judgment was originally scheduled for July 31, 1991. At the request of petitioner's counsel, argument was continued until August 13, 1991.

STIPULATION AS TO THE STATE RECORD

The parties have stipulated that volumes 1 through 22 of the state court record are complete and authentic. The state record has been transferred to the record in this action and, with

the addition of the evidence introduced at the evidentiary hearing, is the basis for this Court's factual findings.

FACTUAL BACKGROUND

This is a summary of the factual background to the crime for which Jeffries was convicted and an outline of the evidence presented at trial. Additional factual details are presented in the analysis of each specific claim for relief.

Petitioner Patrick James Jeffries is a Canadian citizen. In January of 1983, Jeffries became a houseguest at the home of Phillip and Inez Skiff in Clallam County, Washington.[1] The Skiffs allowed Jeffries to stay with them and permitted him to use their wood shop to continue his interest in wood carving. Although Jeffries and the Skiffs appeared to have gotten along well, the relationship may have begun to sour in early March, 1983.

Phillip Skiff was last seen, wearing a blue jumpsuit, on the morning of March 19, 1983 by Alfred and Frieda Opdahl, neighbors of the Skiffs. Inez Skiff was last seen, wearing her gardening clothes, at 1:30 p.m. on the same day by Frieda Opdahl. When their bodies were later unearthed, Phillip Skiff

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[1]The Skiffs met Jeffries while he was serving a 12-year sentence for armed robbery in Canada. This was Jeffries' 15th conviction in 12 years. Jeffries violated the terms of his Canadian parole when he travelled down to Clallam County in January, 1983. Jeffries' criminal record was kept from the jury by the trial judge, but see claims 6.1 and 6.2 below.

was wearing a blue jumpsuit and Inez Skiff was wearing her gardening clothes.

During the day of March 19, 1983, Jeffries was seen several times by the Opdahls on the Skiffs' tractor in a field near the Skiff residence close to where the body of Phillip Skiff was found. He had never been observed by the Opdahls operating the tractor prior to that day.

Sometime later that day, Frieda Opdahl went to the Skiff residence with her grandchildren and some other children so that they could play on the Skiffs' trampoline. At this time Jeffries gave Frieda conflicting accounts as to the whereabouts of Phillip Skiff. First Jeffries said that she might find him down by the creek on the Skiff property. When Frieda and the children began to go down to the creek, Jeffries said that Phillip was getting more cedar from the field south of the Skiff residence. Frieda and the children went down to the creek, but did not meet Phillip Skiff. When they returned to the Skiff residence, Jeffries told Frieda that the Skiffs were going away for a couple of days with some friends and after that they would be leaving on a more extended trip.

Petitioner also showed Frieda, her daughter, and her grandchildren some of his carvings in the woodshop.

In the early afternoon of March 19, 1983, a Rex Elliot went to the field south of the Skiff residence to dump some

brush. Elliot saw Jeffries on the tractor. Jeffries helped Elliot unload two loads of brush. Jeffries identified himself as the Skiffs' son and stated that the Skiffs were thinking of moving. Jeffries invited Elliot and his wife into the house. Jeffries stated that "they were liquidating some property" and discussed the possible sale of a television set.

Rex Elliot noticed a .22 caliber Colt Woodsman on the kitchen counter which Jeffries said he had been cleaning. Elliot did not smell any cleaning solvent. Elliot also noticed an empty shell cartridge lying on the floor.

When asked when the Skiffs would be returning, Jeffries replied that they would be back in a few minutes and asked if the Elliots wanted to wait. The Elliots declined to stay and departed.

On Monday, March 21, at 9 a.m., Jeffries told Alfred Opdahl that the Skiffs had called and told him they were in Seattle, would be returning in a few days, and then leaving again.

Later that day, Jeffries attempted to sell 2.5 ounces of placer gold and two gold coins to a gold dealer in Port Angeles. The dealer was willing to buy but, when Jeffries was unable to produce any identification, refused to consummate the transaction. At approximately 5 p.m. on that same day, Frieda

Opdahl telephoned the Skiff residence. A man whose voice she did not recognize answered the phone.

During the period from March 19 to March 22, 1983, Jeffries was seen at several locations (pool hall, tavern, restaurant, bar, etc.) in Port Angeles. He was observed as having several hundred dollars in American and Canadian currency. Ten days before her death, Inez Skiff withdrew over $30,000 in Canadian currency from a British Columbia Bank. This money has never been found.

On Tuesday, March 22, defendant went to the Opdahls' house and asked directions to Bellingham, stating that he intended to meet someone there. This was the last time petitioner was seen by the Opdahls.

Jeffries left the Skiff residence on March 22 or 23, taking with him the Skiffs' pickup truck, portable television, chain saw, food, liquor, placer gold, coins, and other small articles. He traveled to Wenatchee where he sold some of the gold and coins. While in Wenatchee Jeffries became friends with Dan Helland and the two traveled together for several days. During this period, Jeffries met briefly with his niece and her husband who had traveled down from Canada.

Eventually, Jeffries and Helland decided to prospect for gold in Canada. The two drove up to the Canadian border, abandoned the pickup truck, and hiked into Canada. Along the

way, they stashed some of the food, gear, and rifles in several different locations. Much of this gear was subsequently identified as having belonged to the Skiffs. Helland later testified that Jeffries had told him that he had also stashed some .22 caliber handguns, although these were never recovered.

Once in Canada, Jeffries called his niece and learned that the Canadian police were searching for him. Jeffries' niece was later found to have several rings and figurines identified as having belonged to, or been made by, Phillip Skiff.

Jeffries returned to Wenatchee where he was subsequently arrested on April 7, 1983. He initially identified himself as James Reed, but gave his true name to police the next day.

The bodies of Phillip and Inez Skiff were recovered from two shallow graves on the Skiff property on April 1 and 2, 1983. The apparent locale of the victims' deaths was the Skiffs' jewelry and wood shop. Blood splatters, two spent bullet casings, an apparent bullet hole in a door, and Phillip Skiff's glasses were found there.

Autopsies revealed that both victims had died of multiple .22 gunshot wounds to the front and back. Autopsies were conducted on April 4, 1983. The forensic pathologist concluded that it was impossible to state precisely when the deaths occurred. He stated that normally bodies in this condition, in a

relatively warm environment would have been killed seven to ten days prior to the autopsy (March 25, 1991), but that this period of time would be greater if the bodies had been buried, as they were in this case.

JURISDICTION & VENUE

Petitioner Jeffries is in custody pursuant to the judgment of a state court and seeks relief on the ground that his imprisonment and sentence are in violation of his constitutional rights. This United States District Court therefore has jurisdiction over this petition for habeas corpus relief pursuant to 28 U.S.C. §§ 2254 and 1331.

Petitioner Jeffries was convicted in the Superior Court of Washington in and for Clallam County. Venue is therefore proper in the United States District Court for the Western District of Washington pursuant to 28 U.S.C. § 2241(d).

LEGAL STANDARDS

This is a motion for summary judgment and is therefore governed by the traditional standard for summary judgment under Fed. R. Civ. P. 56. Summary judgment is appropriate if, after viewing the evidence in a light most favorable to the non-moving party, there are no issues of genuine material fact and the moving party is entitled to judgment as a matter of law.

This is also a federal habeas corpus proceeding and there is a presumption that the state trial and appellate court findings

of fact are correct. 28 U.S.C. § 2254(d). Pursuant to statute, the presumption of effectiveness does not apply if it is established or admitted:

> (1) that the merits of the factual dispute were not resolved in the State court hearing;
>
> (2) that the fact finding procedure employed by the State court was not adequate to afford a full and fair hearing;
>
> (3) that the material facts were not adequately developed at the State court hearing;
>
> . . .
>
> (6) that the applicant did not receive a full, fair, and adequate hearing in the State court proceeding;
>
> (7) that the applicant was otherwise denied due process of law in the State court proceeding;
>
> (8) or unless . . . the federal court on a consideration of [the pertinent part of the State court record] . . . concludes that such factual determination is not fairly supported by the record. . . .

28 U.S.C. § 2254(d). The Court will note those instances in which the presumption of correctness does not apply as necessary, below.

DISCUSSION

The amended petition for writ of habeas corpus contains eighteen claims for relief. Eight claims, numbered 6.1 through 6.8, relate to the guilt phase of the trial. Ten claims, numbered 7.1 through 7.10, relate to the penalty phase of the trial. Each of these claims is considered below.

A. Claim 6.1: Failure to Change Venue/Jury Misconduct

Petitioner alleges that the failure of the trial judge to change venue, continue the trial, sequester the jury, or to take other prophylactic steps to protect the defendant from the effects of pretrial and trial publicity rendered the trial fundamentally unfair.

Claim 6.1 contains two distinct allegations. First is a general allegation concerning prejudicial trial and pretrial publicity (¶ 6.1.1 to .6). Second is a specific allegation that one or more jurors improperly introduced extrinsic information concerning Jeffries' criminal background into the jury deliberations (¶ 6.1.7 to .12).

The Washington Supreme Court considered the more general allegation on direct appeal. *Jeffries I*, 105 Wn.2d 398, 409-10 (1986). The more specific allegation was not raised by Jeffries on direct appeal. The issue was raised in Jeffries' third personal restraint petition, but was not considered on the merits by Washington Supreme Court on the grounds that it was an improper "renewed" claim for relief. *Jeffries IV*, 114 Wn.2d 485, 488-491, 497-98 (1990).

1. Trial and pretrial publicity.

(a) Background.

Respondent admits that this case received extensive media coverage in the weeks after the murders of the Skiffs. A

detailed recitation of the media coverage can be found in the state court record. *See* 12 REC 3758-3949. A summary of this coverage is provided below.

Primary coverage occurred in the *Port Angeles Daily News*, a Clallam County newspaper with an average daily paid circulation of 13,001 and a Sunday circulation of 13,791. Clallam County has a population of 50,000 (of which approximately 36,250 individuals are over 18 years of age and, assuming they are registered voters, eligible for jury duty) consisting of approximately 16,400 households.

The bodies of Philip and Inez Skiff were discovered on April 2, 1983. The *Port Angeles Daily News* published stories relating to the murders on April 4, 5, 6, 8, 10, 13, 15, 17, 19, May 1, 8, and 11, 1983. Jury voir dire commenced on October 3, 1983 and the trial itself began on October 19, 1983.

The news articles, many of which were on the front page of the *Daily News*, included the following information about the crime and petitioner Jeffries: (1) Jeffries' Canadian conviction for armed robbery, his prison term in Canada, and the fact that he was on parole and being sought by Canadian authorities for possible parole violations; (2) the Clallam County Sheriff's statement that Jeffries was "armed and dangerous" and that the murders had been premeditated; (3) the fact that the Skiffs had died of multiple gunshot wounds and that their bodies were

"gunshot-riddled"; (4) a description and diagram of the crime scene; (5) the statements of the Opdahls, who testified extensively at trial and were the last witnesses to see the Skiffs alive; (6) the fact that firearms were missing from the Skiff residence; and finally, (7) details of Jeffries' arrest. Several of the articles also included a photograph of Jeffries.

The *Seattle Post-Intelligencer* reported the murders on Monday, April 4, 1983, Section A, page 1. The *Seattle Times* reported the case on Tuesday, April 5, 1983, Section B, page 1. The combined daily circulation of these two papers in Clallam County is 3,988.

Television and radio coverage was also fairly extensive. There are 16,400 television households in Clallam County, with Seattle television stations dominating the market. KOMO Television reported the story on April 4, 5, 7, 8, 9, 10, 11, and 15, 1983. KING Television broadcast the stroy on April 4, 5, and 15, 1983. Other broadcasts also occurred. The content of the broadcasts was similar to the coverage contained in the *Port Angeles Daily News*, including Jeffries' prison record, his parole status, and the Sheriff's statement that there was probable cause to arrest Jeffries. A photograph of Jeffries was also broadcast.

On May 9, 1983, the defense moved for a change of venue and, at oral argument, suggested that a jury be selected in another county and brought to Clallam County for the trial.

These motions were denied by the trial judge. 1 REC 179. When the case became a "death case," the defense requested that the court reconsider its decision not to change venue. The motion for reconsideration was denied. 1 REC 264-65. The motion for a change of venue was renewed, and again denied, after a letter threatening Jeffries with death was received by the Prosecuting Attorney's office. 2 REC 531. The defense moved to close the courtroom and to seal pretrial pleadings. This motion was denied. 1 REC 183-84.

Jury selection commenced on October 3, 1983 and concluded on October 18, 1983. One hundred and eighty venire persons were available as jurors. Six members of the venire were excused for cause on the grounds that they believed the defendant was guilty based upon what they had read or seen in the media. 5 REC 1446-50, 1506, 1552-54, 1557-58; 6 REC 1908-10; 7 REC 1960. Three venire members were excused because they read about the case after being instructed not to by the trial judge. 5 REC 1392; 7 REC 2023, 2029. The defendant exercised four peremptory challenges against venire members who had information derived from the media concerning the case. 3 REC 891; 4 REC 985; 5 REC 1537; 6 REC 1613-14, 1626-27.

Of the 12 venire members eventually chosen for the jury, 11 had been exposed to media coverage of the murders. Each

of these individuals stated that he or she had not formed an opinion as to Jeffries' guilt. Each juror also stated that he or she could set aside whatever information he or she had received and judge the case on the evidence presented. None of these 11 jurors was challenged for cause by the defense. In addition, the defense did not exercise any of 8 available peremptory challenges to excuse these individuals.

(b) Analysis.

As a federal court sitting in habeas corpus, this Court must conduct an independent review of the record to determine whether the media coverage so prejudiced the petitioner that a fair trial was impossible. This review must include an examination of the exhibits containing news reports about the case for volume, content, and timing to determine whether they were prejudicial. Determinations of juror bias are factual determinations to which the presumption of correctness under 28 U.S.C. § 2254(d) applies, although the constitutional standard of jury impartiality is a question of law. *See Harris v. Pulley*, 885 F.2d 1354, 1360-61 (9th Cir. 1988) (and cases cited therein).

Due process requires a change of venue when the trial court is unable to seat a panel of impartial and indifferent jurors because of prejudicial pretrial publicity or an inflamed community atmosphere. *Id.* at 1361; *Rideau v. Louisiana*, 373 U.S. 723, 726 (1963). The prejudicial effect of pretrial publicity

is tested under: (1) a presumed prejudice standard and (2) an actual prejudice standard.

1. Presumed Prejudice: Prejudice is presumed (*i.e.*, it is not necessary to determine if actual prejudice is present) when the record demonstrates that the community where the trial was held was "saturated with prejudicial and inflammatory media publicity." *Rideau*, 373 U.S. at 726-27. Presumed prejudice is rare and reserved for those extreme situations in which the pretrial publicity has rendered the subsequent trial a "hollow formality."

A review of the exhibits contained in the state court record detailing the nature and extent of the pretrial publicity convinces the Court that this is not a case in which prejudice should be presumed. The Court agrees with the trial judge's characterization of the media coverage as essentially factual in nature. Simply put, while the media coverage clearly identified Jeffries as a prime suspect (which was certainly correct), the Court does not consider the coverage to have been unduly inflammatory or prejudicial.

In addition, the bulk of the media coverage was limited to a two-month period immediately following the discovery of the bodies. The selection of a jury did not begin until six months later. The delay between media coverage and jury

selection substantially limits the prejudicial effect of the media coverage.

The Court therefore declines to find "presumed prejudice" from the jurors' pretrial media exposure.

2. Actual Prejudice: Next, the Court must determine whether the jurors demonstrated actual partiality or hostility that could not be laid aside. *Harris*, 885 F.2d at 1363; *Murphy v. Florida*, 421 U.S. 794, 800 (1975). Actual prejudice does not mean that the jurors must be totally ignorant of the facts and issues involved, but rather that they must be unable to set aside their opinions and impressions and render a verdict on the evidence presented. *Harris*, 885 F.2d at 1363.

The Supreme Court has stated that a good indicator for determining the reliability of juror assurances of impartiality is the number of venire members who will admit to a disqualifying prejudice. The greater the number of venire members who admit to prejudice, the more doubtful are the voir dire responses of the remaining jurors. *Murphy*, 421 U.S. at 803.

It is thus irrelevant in the present case that 11 of the 12 jurors had some prior knowledge of the case. All of those jurors stated under oath that they could set their previous knowledge aside and impartially judge the guilt or innocence of the defendant. The validity of the jurors' assurance of impartiality is confirmed by the fact that of the 180 members of the venire,

only six were excused because, based upon what they had seen or read in the media, they believed the defendant to be guilty. Three more venire members were excused after reading about the case after having been instructed by the trial judge not to do so.

As the Supreme Court noted in *Murphy*, it is not unusual in a highly publicized case to excuse 20 individuals from a pool of 78 because they had formed an opinion of the defendant's guilt. *Id.* Clearly, the very limited number of jurors excused in the present case (6 out of 180) on this ground demonstrates that the actual prejudice caused by media exposure was virtually nonexistent.

In addition, the Court notes that the voir dire of all the jurors was extensive and thorough. The state record of the jury voir dire is contained in almost five volumes of material. Petitioner has not specified any specific portion of this record as suspect. The Court has reviewed this portion of the record and concludes that the defendant had a more than adequate opportunity to uncover any potential or actual prejudice. Moreover, in light of the defendant's eight unused peremptory challenges, the defendant could easily have stricken any venire member whose impartiality was suspect.

The Court declines to find actual prejudice resulting from the pretrial media coverage in this action.

2. Extrinsic evidence re: Jeffries' criminal history.

(a) Background.

Petitioner has alleged that the media coverage outlined above resulted in two specific instances of jury misconduct during the trial. Both involve references to Jeffries' criminal history. The trial court had previously granted defense motions in limine excluding any reference to Jeffries' criminal or parole record.

First, during the guilty phase, there is an allegation that one of the jurors stated: "[T]he guy's a convicted robber anyway . . . oh, we're not supposed to know that are we?" Second, there is an allegation that during the penalty phase of the trial there "was some discussion of Mr. Jeffries' character in light of his possible record."

The background of the first instance of alleged juror misconduct follows. Two years after the trial, juror Thomas Tyszko alleged in an affidavit that, while returning to the jury room, another juror stated to the entire jury that "Jeffries is a convicted armed robber." In a subsequent affidavit, Tyszko stated that juror followed up this remark with a smirk and stated "Oh, we're not supposed to know that, are we?" This remark was allegedly followed by silence. In a third affidavit, Tyszko identified juror Erin Thomas as the source of the remark.

Tyszko stated that he was unsure if anyone else had heard the remark except perhaps Kathleen Sims, that he personally ignored the comment, and that the issue was never raised again during the deliberations.

Kathleen Sims recalls that a statement along the lines suggested by Tyszko may have been made. She does not believe that it was heard by many of the jurors. Sims testified at the evidentiary hearing that the remark, if it was made, was given very little attention by any of the jurors. Sims stated that someone, perhaps even Sims herself, may have responded that Jeffries' criminal record was irrelevant and that it should not be discussed.

The testimony of juror Michael Stamon essentially mirrors that of juror Sims. Stamen was even less sure that such a comment had been made.

None of the remaining jurors recalls a comment concerning Jeffries' record being made in this context. Erin Thomas specifically denies making the statement attributed to him by Tyzsko and denies any prior knowledge of Jeffries' criminal record. The jury foreman states that, had he heard such a statement, he would definitely have reported it to the trial judge.

After considering the affidavits contained in the state record and the testimony offered at the evidentiary hearing, the

Court concludes that this reference to Jeffries' criminal background, if it was made at all, occurred only once, was almost certainly heard by only a few jurors, and did not play a role of any significance in the course of the guilt phase deliberations.

The second incident of juror misconduct is even more sparse. Juror Sims has testified that during the penalty phase of the trial one juror stated: "Didn't Jeffries have a record?" Sims states that the jury concluded this question to be irrelevant and it was not considered during the remainder of their deliberations.

(a) Analysis.

While the introduction of extrinsic evidence raises a constitutional issue as to whether the defendant was tried by an impartial jury, "due process does not require a new trial every time a juror has been placed in a compromising situation." *Smith v. Phillips*, 455 U.S. 209, 217 (1982). In cases involving the introduction of extrinsic evidence into jury deliberations, "the proper standard to be applied is whether it can be concluded beyond a reasonable doubt that extrinsic evidence did not contribute to the verdict." *Gibson v. Clanon*, 633 F.2d 851, 855 (9th Cir. 1980).

The Ninth Circuit has outlined five factors to be considered when assessing such claims of jury misconduct:

> (1) whether the extrinsic material was actually received, and if so, how; (2) the length of time it was available to the jury; (3) the extent to which the jury discussed and considered it; (4) whether the extrinsic material was introduced before the verdict was reached, and if so, at what point in the deliberations was it introduced; and (5) any other matters which may bear on the issue of the reasonable possibility of whether the introduction of extrinsic material affected the verdict.

Bayramoglu v. Estelle, 806 F.2d 880, 887 (9th Cir. 1986) (citations omitted). After considering these factors in light of the state court record and the evidence offered at the evidentiary hearing, the Court concludes that there was no reasonable possibility that the extrinsic evidence contributed to the verdict either in the guilt or death penalty phase.

In applying the *Bayramoglu* factors to the alleged remark made during the guilt phase as the jury was returning to the jury room, the Court concludes as follows. First, even assuming that the remark was made, it was heard only by three jurors at most. The rest of the jury did not "receive" this information. Second, the evidence clearly indicates that the remark was made only in passing and was not repeated. Third, the remark was neither considered nor dwelled upon by the jury. Fourth, the remark was introduced prior to a verdict being reached. The record is unclear, but it was apparently not introduced during deliberations, but rather in the course of the trial itself. Fifth, and perhaps most importantly, is the fact that even those jurors

who actually heard the remark have repeatedly stated that it was not a factor in reaching their decision.

The *Bayramoglu* factors apply in virtually the same manner to the comment allegedly made during the penalty phase. Briefly, the comment was only recalled by a few individuals and each of those individuals agrees that the comment was brief and was not a factor in his or her decision to impose the death penalty.

Under these circumstances, the Court concludes that there is no reasonable possibility that the introduction of extrinsic evidence affected the jury verdict in this action.

For the reasons outlined above, the Court declines to grant petitioner Jeffries' claim for relief number 6.1.

B. Claim 6.2: Insufficient Evidence

Jeffries alleges that there was insufficient evidence presented at trial to support a finding of aggravating circumstances beyond a reasonable doubt.

1. Background.

The factual background of the crimes with which petitioner Jeffries was charged has been outlined in the preliminary section of this order and are incorporated here by reference.

In Washington, an individual is guilty of aggravated first degree murder if he is found to have committed murder in the

first degree as defined in RCW 9A.32.030(1)(A) ("premeditated intent to cause the death of another person, he causes the death of such person or of a third person") and one or more of the aggravating circumstances outlined in RCW 10.95.020 are found to exist.

Jeffries was charged with the following two aggravating circumstances on each of the two counts of murder: (1) that the defendant committed the murder to conceal the commission of a crime or to protect or conceal the identity of any person committing a crime, and (2) that there was more than one victim and that the murders were part of a common scheme or plan or the result of a single act of the defendant.[2] The jury returned a special verdict finding both aggravated circumstances present on both counts. RCW 10.95.020(7) and (8). 15 REC 4806, 4808, 4810-11.

Jeffries contends that insufficient evidence existed to tell what underlying crime has been committed, what victim was murdered first, and whether the murders were part of a common scheme or plan.

The Washington Supreme Court reviewed the record and concluded that there was "substantial evidence to support the jury's findings and verdict that defendant killed the victims in

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[2]A third aggravating circumstance was dismissed prior to trial.

order to steal their property and to prevent his identification as their killer." *Jeffries I*, 105 Wn.2d 398, 407 (1986).

2. Analysis.

In a criminal action the burden is on the prosecution to prove every fact necessary to constitute the charged crime beyond a reasonable doubt. *In re Winship*, 397 U.S. 358, 364 (1970).

A challenge to a state criminal conviction under 28 U.S.C. § 2254 based on a claim of insufficient evidence, however, shall be granted only if it is found upon "viewing the evidence in a light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Jackson v. Virginia*, 443 U.S. 307, 319 (1979).[3] Another way of stating this standard is that habeas relief on this claim is only appropriate if no rational trier of fact could have found proof of guilt beyond a reasonable doubt. *Id.* at 320-24.

Applying this standard, the Court concludes that the jury could rationally have found the presence of either of the two aggravating circumstances.

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[3]This standard is identical to that employed by the Washington State Supreme Court when considering this issue. *Jeffries I*, 105 Wn.2d 398, 407 (1986); *State v. Green*, 94 Wn.2d 216 (1980).

To begin with, petitioner raises a variety of questions designed to attack the sufficiency of the evidence. Petitioner, for example, questions why, if he was intending to steal the Skiffs' property, did he not commit the crime when the Skiffs were in California, why did he leave behind three television sets and a VCR, why did he not remove the jewelry from the body of Inez Skiff, and why did he remain at the residence for four days following the murders?

Questions of this kind, however, can always be asked when the evidence against the defendant is circumstantial. Because there is no evidence suggesting that Jeffries discussed his motives or plan with anyone prior to committing the crime, and because no one actually witnessed the crimes, it is impossible to say precisely why Jeffries elected to take one course of action as opposed to another. Nor is such a precise recounting of Jeffries' motives or reconciliation of his actions required of this Court. The only issue is whether a jury could have rationally reached its decision based upon the evidence presented to it.

The Court begins with the uncontested fact that Jeffries was in possession of the Skiffs' property -- including a truck, chain saw, guns, gold, television set and a variety of other articles -- shortly after the Skiffs were murdered. There is, of

course, a variety of possible scenarios as to Jeffries' involvement in the murder that may be posited from this bare fact.

One obvious possibility is that Jeffries conceived of a plan for murdering the Skiffs so that he might steal their property with less chance of detection. This, the Court believes, is a rational interpretation of the events that were presented to the jury. By itself, this information is sufficient grounds for finding that a rational jury could have concluded that the aggravating circumstances were present.

When the additional circumstances surrounding the murders are considered, this rational possibility becomes a reasonable probability. These additional factors include: Jeffries' attempt to sell the Skiffs' television to the Elliots shortly after the Skiffs' deaths; Jeffries' presence at a Port Angeles bar with a large amount of Canadian currency on the evening that the murders were probably committed; Jeffries' attempt to sell gold belonging to the Skiffs two days after their deaths; and Jeffries' various attempts to confuse individuals as to the location of the Skiffs and when they would return. With this evidence before it, it is possible -- even, the Court believes, likely -- that a rational jury would find the presence of aggravating circumstances.

Claim 6.2 will be denied.

C. Claim 6.3: Failure to Define Aggravating Circumstances

Jeffries contends that the trial court's failure to define the essential elements of the "aggravated circumstances" in this death penalty case constitutes constitutional error.

1. Background.

Jeffries was charged with premeditated first degree murder. In Washington, if the existence of certain aggravating circumstances is proven, premeditated first degree murder can lead to a sentence of death. Before a sentence of death may be imposed, the prosecutor must first seek the death sentence, the state must prove the presence of certain aggravating circumstances, and then the jury must find that there are not sufficient mitigating circumstances to merit leniency. RCW 10.95.020 *et seq*. Jeffries challenges the sufficiency of the jury instructions and verdict form as they relate to the aggravating circumstances issue.

At the guilt phase of the trial, the jury returned the following special verdict as to both counts.

> We, the jury, return a special verdict . . . by answering as follows:
>
> The defendant committed the murder to conceal the commission of a crime or to protect or conceal the identity of any person committing a crime.
>
> Answer: Yes
> (Yes or No)

There was more than one victim and the murders were part of a common scheme or plan or the result of a single act of the defendant.
Answer: Yes
(Yes or No)

15 REC 4810-11.

Petitioner contends that the trial judge's instructions and verdict form are flawed because they failed to specify or define the following essential elements of the offense: (1) the crime Jeffries was alleged to have concealed; (2) the "common scheme or plan"; (3) the mental states corresponding to the acts alleged as aggravating circumstances; and (4) the indicia of mens rea attendant to the common scheme or plan or result of a single act.

While Jeffries does not indicate the instructions to which he objects, they appear to be Instruction No. 6 (definition of aggravated murder in the first degree), No. 7 (to convict -- count I), and No. 8 (to convict -- count II). 15 REC 4796-4800. Jeffries did not object to these instructions on the grounds raised in claim 6.3 at trial.[4]

The Washington Supreme Court considered, and denied, the instant argument on direct appeal.[5] The Washington

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[4]Jeffries did object to Instruction Nos. 6, 7 and 8 on the grounds that there was not "sufficient evidence to convince any rational trier of fact beyond a reasonable doubt of the elements of aggravation." 11 REC 3472.

[5]The Supreme Court considered this argument despite the fact that Jeffries had failed to object to the instructions at trial. 105 Wn.2d at 418. Because the Supreme Court reached this argument, this Court will also consider the merits

Supreme Court specifically held that Washington's aggravated murder statute does not include a requirement that a specific crime be stated or proven, only that the defendant committed the murders to conceal his identification as the person committing a (general, not particular) crime. *Jeffries I*, 105 Wn.2d 398, 419-420 (1986).

2. Analysis.

In order to establish a due process violation based upon faulty jury instructions, a habeas petitioner must show the instruction by itself infected the entire trial to such an extent that the resulting conviction violates due process. *Cupp v. Naughten*, 414 U.S. 141, 147 (1973); *Van Pilon v. Reed*, 799 F.2d 1332, 1342 (9th Cir. 1986). The burden on the petitioner becomes "especially heavy" when the alleged error is the failure to give an instruction, as opposed to the actual giving of an erroneous instruction. *Henderson v. Kibbe*, 431 U.S. 145 (1977).

Petitioner argues extensively that the instructions and verdict form violate the general constitutional mandate that every element of the crime be proved beyond a reasonable doubt. The principle that all elements of the crime must be proven beyond a reasonable doubt is a proposition with which the Court certainly agrees. *See In re Winship*, 397 U.S. 358, 369 (1970).

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of petitioner's claim.

The United States Supreme Court has made it abundantly clear, however, that the prosecution must prove beyond a reasonable doubt only those elements of the crime included in the definition of the offense. *Patterson v. New York*, 432 U.S. 197, 210-211 (1977). Moreover, it is the sole responsibility of the States to define the elements of criminal offenses. *See, e.g., Martin v. Ohio*, 480 U.S. 228, 232 (1987) (reiterating the "preeminent role of the States in preventing and dealing with crime and the reluctance of the Court to disturb a State's decision with respect to the definition of criminal conduct . . . including the burden of producing evidence and allocating the burden of persuasion").

In the present case, the Washington Supreme Court has determined that under Washington law there is no requirement that the prosecution prove that a defendant charged with aggravated first degree murder intended to conceal a particular crime. *Jeffries I*, 105 Wn.2d 398, 419-20 (1986). This conclusion is consistent with the Supreme Court's interpretation of Washington's similar statutes involving "intent to commit a crime" provisions. *See, e.g., State v. Bergeron*, 105 Wn.2d 1 (1985).

Therefore, petitioner's belief that it is necessary for the State to specify and define which crime defendant intended to commit is clearly incorrect. Washington State has not included

that as an element of the offense of premeditated first degree murder.

To the extent that petitioner is suggesting that the definition of aggravating circumstances is unconstitutionally vague, the argument is not well taken. The United States Supreme Court has stated that a capital sentencing scheme must provide a meaningful basis for distinguishing those case in which the death penalty is imposed from those in which it is not, must obviate standardless sentencing discretion, and must channel the sentencer's discretion by clear and objective standards. *Godfrey v. Georgia*, 446 U.S. 420, 427-28 (1980) (and case cited therein) (finding "outrageously or wantonly vile, horrible or inhuman in that in involved torture, depravity of mind, or an aggravated battery to the victim" to be an unconstitutionally vague aggravating circumstance).

The Court does not believe that the "committing a murder to conceal a crime" or the "common scheme or plan" aggravating circumstances are unconstitutionally vague. Both are straightforward concepts that define an essentially objective standard (unlike the subjective "outrageously or wantonly vile, horrible or inhuman"). These concepts are intuitively understandable by a lay jury. They are not so malleable that meaningful appellate review is impossible. The Court declines to find error on this ground.

The Court will deny claim for relief 6.3.

D. Claim 6.4: Failure to Require Unanimous Verdict, Guilt Phase

Jeffries alleges that the jury was permitted to return a verdict that was not necessarily unanimous, violating his rights under the Sixth, Eighth, and Fourteenth amendments. This argument is related to claim 6.3, discussed above, and to claim 7.9, discussed below.

1. Background.

The "to convict" instructions on each of the two murder counts stated:

> (a) That the defendant convicted the murder to conceal the commission of a crime or to protect or conceal the identity of any person committing a crime; or
>
> (b) There was more than one victim and the murders were part of a common scheme or plan or the result of a single act of the defendant.

15 REC 4798, 4799; RCW 10.95.020(7) and (8). Petitioner contends that these instructions permitted the jury to return a verdict where not all the jurors necessarily agreed on the existence of a single aggravating circumstance. That is, some jurors could have found that the common plan was to commit murder, while others could have found that the common plan was to commit theft, etc. Petitioner argues that these multiple

possibilities impermissibly precluded the jury from reaching a unanimous verdict.

Instruction No. 12 stated in part:

> If you find the defendant guilty on verdict form A, do not use verdict form B. If you find the defendant not guilty or are unable to reach a unanimous decision on verdict form A, use verdict form B and enter the words "guilty" or "not guilty" according to the decision you reach.

15 REC 4804. Petitioner did not object to either of these instructions at trial.

2. Analysis.

Normally, a general instruction on the requirement of unanimity suffices to instruct the jury that they must be unanimous on whatever specifications form the basis of the guilty verdict. *United States v. Payseno*, 782 F.2d 832, 835 (9th Cir. 1986). The exception is when "there is a genuine possibility of jury confusion or that conviction may result from different jurors concluding that the defendant committed different acts." *United States v. Echeverry*, 719 F.2d 974, 975 (9th Cir. 1983).

The Court is not convinced that such confusion is present here. First, as discussed in the previous section, there was no need for the jury to determine whether a specific crime occurred in order to find the presence of an aggravating circumstance pursuant to RCW 10.95.020(7). The jury need only be unanimous in its decision that the murder was committed to

conceal the commission of some (nonparticular) crime. It is therefore irrelevant whether the jury unanimously concluded that the murder was committed to conceal the crime of theft or to conceal the murder of one of the Skiffs, all that the jury had to agree upon was that the murder was committed to conceal a crime. There is little possibility of jury confusion in this regard.

Second, the phrase "common scheme or plan" contained in RCW 10.95.020(8) is, the Court believes, self-explanatory and unlikely to lead to jury confusion. As long as the jury was unanimous in its belief that the murders were committed as part of such a common scheme -- which the verdict form indicates that they did -- then the requirements of the statute are satisfied.

The Court concludes that the general unanimity instruction offered by the trial judge was sufficient to protect the defendant's right to a unanimous verdict.

E. Claim 6.5: Newly Discovered Evidence

Jeffries argues that the failure of the trial court to grant a motion for a new trial based on newly discovered evidence denied his Fifth, Eighth, and Fourteenth Amendment rights.

1. **Background.**

The newly discovered evidence comes from Josephine Green, the former manager of Fairchild Travel Service in Sequim, Washington. 15 REC 4908.

Green testifies that on March 19, 1991 at approximately 10:30 a.m. a Buick automobile covered with mud, and with California license plates, drove up to her office. Green was so frightened by the three "very sinister looking men" in the car that she called her manager and said that she was about to be robbed. Green's manager told her to leave the phone off the hook, but Green was "so shaken" that she hung up.

One of the men -- who was about 38 years old, had a beard, a ragged cloth jacket, and was unkempt -- entered the business. He told Green that he was looking for a place on the Barr Road extension and showed her a telephone number. The Barr Road extension leads into the Barr Road, where the Skiff residence was located. When Green offered to place the call the man, who was adamant about her not calling, grabbed the telephone number and left. The car drove away in a screech and stopped at a nearby gas station.

Phillip Skiff was last seen on the morning of March 19, 1991. Inez Skiff was last seen at approximately 1:30 p.m. on the same date. Green's encounter with the men in the Buick thus occurred approximately three hours before the last sighting of Inez Skiff. The travel service managed by Green is located about five miles from the Barr Road where the Skiffs lived.

Petitioner urges that this newly discovered evidence be considered in the context of the evidence which was introduced

at trial, in particular, the testimony that Phillip Skiff grew, smoked, and sold marijuana.

One friend of the Skiffs stated that there was several hundred thousand dollars' worth of marijuana stashed in the residence on January 1, 1983. The Skiffs traveled to California in late January, 1983. Only a small amount of marijuana, several marijuana smoking devices, and 12 marijuana stalks were recovered during the search of the Skiff residence on April 2, 1983. 8 REC 2624, 2628; 9 REC 2710, 2733-34, 2904; 10 REC 3277, 3417-19, 3439; and 12 REC 3460-61. Petitioner was not in possession of any marijuana when he was arrested nor was any marijuana discovered in his secret storage caches.

On the basis of Green's newly discovered testimony, Jeffries moved for a new trial. The trial judge declined to grant this motion. The Washington Supreme Court did not consider this issue on the merits, ruling that Jeffries had "abused the writ" by not raising the issue in a previous petition. By Order dated April 15, 1991, this Court ruled that consideration of this issue was not precluded by the "procedural bar" doctrine.

The Court ordered an evidentiary hearing on this claim. The only testimony offered by petitioner on this claim was that of Josephine Green. Unfortunately, due to illness, Green's doctor recommended that she not travel to Seattle to testify at the evidentiary hearing. The Court's consideration of this issue is

therefore limited to a second affidavit submitted by Green. This affidavit substantially mirrors the affidavit filed with the state trial court.

2. Analysis.

By itself, the existence of newly discovered evidence relating to guilt is not sufficient grounds for habeas corpus relief. *Townsend v. Sain*, 372 U.S. 293, 317 (1963).[6] Instead, it must be shown that the newly discovered evidence would probably have resulted in the defendant's acquittal. *Quigg v. Crist*, 616 F.2d 1107, 1112 (9th Cir.), *cert. denied*, 449 U.S. 922 (1980); *Gordon v. Duran*, 895 F.2d 610, 614-15 (9th Cir. 1990).

While the testimony of Josephine Green is superficially compelling, the Court does not believe that the evidence she presents, had it been available to the jury, "would probably have resulted in acquittal." Green's testimony does nothing to contradict the strong circumstantial evidence linking Jeffries to the murders. This circumstantial evidence, which has already been discussed in claim 6.2, includes: Jeffries' presence at the crime scene, his presence near the Skiffs' graves, his inconsistent statements to Mrs. Opdahl as to the location of the Skiffs; and

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[6] *Townsend* established the rule that a federal district court must conduct an evidentiary hearing whenever "evidence crucial to the adequate consideration of the constitutional claim was not developed at the state court hearing . . ." 372 U.S. at 317. As noted above, petitioner has been granted the opportunity to present evidence on this claim.

his possession of the Skiffs' property in the days following murder.

Jeffries' interpretation of the Green testimony is that the Skiffs were murdered as the result of a drug deal that went bad. It is important to remember that the jury had before it substantial testimony concerning Phillip Skiff's involvement in growing and possibly selling marijuana. The jury apparently gave this evidence little credence either in terms of minimizing the aggravating circumstances or as a possible mitigating factor. The Court does not believe that Green's testimony, by itself, would be likely to change a juror's opinion in this regard.

Strong circumstantial evidence of this nature has been held by the Ninth Circuit to be sufficient grounds to deny a motion for a new trial on the grounds that there has been newly discovered evidence -- evidence which only suggests that some other individual might have committed the crime, not that the defendant did not commit the crime. *Quigg*, 616 F.2d at 1112.

While the issue is a close one, the Court does not believe that the trial judge's decision not to grant a new trial based on the newly discovered evidence was an error of constitutional magnitude. The Court will deny petitioner's claim for relief number 6.5.

F. Claim 6.6: Prejudicial Testimony – Petitioner in Jail

In claim 6.6, Jeffries alleges that the testimony of a prosecution witness referring to Jeffries' having been in jail violated his Sixth, Eighth, and Fourteenth Amendment rights.

1. Background.

John Kennedy, a friend of the Skiffs, was a prosecution witness. On direct examination he was asked by the prosecutor when it was that he had first heard of Mr. Jeffries. Kennedy replied: "[I]t was when I met Phil and Inez in Chilliwack that he used to do carving and things like that when he was in jail somewhere in Canada." 8 REC 2635.

Defense counsel objected and, out of the presence of the jury, moved for a mistrial. The trial judge denied the motion and found that Kennedy's response had been inadvertent and not intentionally elicited by the prosecutor. The Court directed the jury to disregard the prosecutor's question and Kennedy's response. 8 REC 2637-38.

2. Analysis.

Habeas relief is available for error in the interpretation or application of state evidentiary rules only when the admission of the questioned evidence renders the trial so fundamentally unfair as to violate federal due process. *Butcher v. Marquez*, 758 F.2d 373, 378 (9th Cir. 1985); *McGuire v. Estelle*, 873 F.2d 1323, 1325 (9th Cir. 1989).

In the present action, Jeffries has not met his burden of establishing that the evidence in question rendered the trial fundamentally unfair. There is no indication on the record that the question or response were intended to elicit information concerning Jeffries' criminal history. To the contrary, the trial judge specifically found that statement to be inadvertent. The trial judge's remedial instruction to the jury offset any possible prejudice caused by this incident. The trial judge's decision to deny defendant's motion for a mistrial does not rise to the level of constitutional error.

G. Claim 6.7: Weapons Unrelated to Charged Offense

In claim 6.7 Jeffries alleges that the admission of evidence that, subsequent to the killings, he was in possession of three guns and ammunition "unconnected" with the charged crimes violated his Sixth, Eighth, and Fourteenth Amendment rights.

1. Background.

Four or five days after the Skiffs were last seen, Jeffries met Dan Helland in Wenatchee and the two traveled together for several days. Jeffries had a .22 semi-automatic rifle and Helland had a 30.06 lever action rifle. Both weapons were subsequently hidden, cleaned and broken down. Helland later testified that Jeffries had told him that he had .22 caliber handguns "stashed." 8 REC 2451-2478; 8 REC 2553-54. The two rifles and some

.22 caliber bullets were recovered from three different "stashes" near the Canadian border.

A .22 caliber rifle, a .22 caliber Regent revolver, a .22 caliber Ruger semi-automatic pistol, and some .22 bullets were missing from the Skiff residence after the killings.

The rifles, bullets, and Helland's statement about the handguns were admitted into evidence. Petitioner contends that the introduction of such evidence is prohibited by Washington Rule of Evidence 404(b), which states that "evidence of other crimes, wrongs, or acts is not admissible to prove character of a person or to show that he acted in conformity therewith."

On direct appeal, the Washington Supreme Court rejected this argument. The Supreme Court stated that, under Washington law, only weapons unrelated to the crime were inadmissible. *See, e.g., State v. Robinson*, 24 Wn.2d 909, 915 (1946). The Supreme Court found that in the present action (1) that "the .22 caliber rifle and bullets were stolen from the victims and were part of the crime," (2) that since both unaccounted for pistols could have been the murder weapon or weapons, "the jury could infer that the defendant had stolen the two missing guns and used them to murder the Skiffs," and (3) that FBI had determined that the bullets could have come from the same boxes of .22 caliber bullets recovered from Jeffries' "stash." The Supreme Court concluded that the

weapons and bullets were related to the crime and that their introduction into evidence was admissible.

2. Analysis.

The applicable standard of review as to the propriety of the introduction of this contested evidence is the same as that outlined in the previous section. Namely, petitioner must demonstrate that the introduction of the evidence violated state rules of evidence and rendered the trial so fundamentally unfair that federal due process is violated. Again, petitioner has failed to satisfy this test.

First, as outlined above the Washington Supreme Court has clearly stated that the introduction of weapons related to the crimes does not violate Washington Rule of Evidence 404(b). There is thus no violation of a state evidence rule and no grounds for habeas relief. Moreover, this Court believes that the Washington Supreme Court's determination that the weapons and ammunition were related to the crime is fairly supported by the evidence and therefore entitled to a presumption of correctness. The Court will deny petitioner's request for relief number 6.7.

H. Claim 6.8: Failure to Prosecute by Indictment

Jeffries alleges that the failure to prosecute this capital case by indictment violated his rights guaranteed by the Fifth, Eighth, and Fourteenth Amendments.

1. Background.

Petitioner was charged by information filed on April 4, 1983, with two counts of murder in the first degree. He was arraigned and pleaded not guilty to both counts on April 15, 1983. On May 6, 1983, an amended information was filed alleging two counts of aggravated murder in the first degree. Petitioner was arraigned and pled not guilty to the amended information on May 25, 1983. The state did not convene a grand jury and no indictment was ever issued against the petitioner.

Indictment by grand jury is not required under Washington law. Wash. Const. Art. I, § 25; RCW 10.37.

2. Analysis.

In *Hurtado v. California*, 110 U.S. 516 (1884), the United States Supreme Court first held that indictment by grand jury was not part of the due process guarantees provided state criminal defendants through the Fourteenth Amendment. This holding has been specifically applied to Washington State's practice of prosecution by information. *Gaines v. Washington*, 272 U.S. 81 (1928). The *Hurtado* holding remains valid. *Rose v. Mitchell*, 443 U.S. 545, 557 (1979); *Narten v. Evman*, 460 F.2d 306, 312 (9th Cir. 1969).

Petitioner devotes a considerable portion of his memorandum in opposition arguing that *Hurtado* holding is

incorrect and ripe to be overruled. Petitioner traces both the historical development of the grand jury system and the development of the "incorporation doctrine" over the last 100 years. Of necessity, petitioner's analysis stops circa 1973, for the Supreme Court has never taken the final step and held that the indictment requirement of the Fifth Amendment is binding upon the states, and it is, this Court believes, unlikely to do so now.

Given the ample precedent supporting prosecution by information, the Court declines petitioner's request to establish a new constitutional rule on this issue.

I. Claim 7.1: Mitigating Circumstances (Plural)

Jeffries contends that the penalty phase instructions and the verdict form precluded a juror from giving effect to a single mitigating circumstance, no matter how weighty, because the instructions required that there be mitigating circumstances (plural) in order to merit leniency.

1. Background.

The Washington death penalty statute requires the prosecution to prove the absence of sufficient mitigating circumstances. The statute states:

> (4) Upon conclusion of the evidence and argument at the special sentencing proceeding, the jury shall retire to deliberate upon the following question: "Having in mind the crime of which the defendant has been found guilty,

are you convinced beyond a reasonable doubt that there are not sufficient mitigating circumstances to merit leniency?"

RCW 10.95.060(4) (emphasis added). Respondent naturally focuses on the "beyond a reasonable doubt" language and the burden of proof imposed upon the state. Petitioner focuses on the mitigating circumstances (plural language). The issue is significant because during the special sentencing proceeding the only evidence in mitigation introduced by the defense was several examples of Jeffries' wood carvings. See claim 7.6.

The jury instructions and the verdict form both mirror the language of the statute. Instruction No. 3:

> The question you are required to answer is as follows:
>
> > "Having in mind the crime of which the defendant has been found guilty, are you convinced beyond a reasonable doubt that there are not sufficient mitigating circumstances to merit leniency?"
>
> If you unanimously answer "yes" the sentence will be death. If you do not unanimously answer "yes" or if you unanimously answer "no", the sentence will be life imprisonment without the possibility of parole.
>
> In deciding the question posed, you may consider any relevant factors.

15 REC 4825. The special sentencing proceeding verdict form repeated the interrogatory contained in Instruction No. 3. Instruction No. 4 stated:

> During the special sentencing proceedings, the State bears the burden of proving beyond a reasonable doubt that there are not sufficient mitigating circumstances to merit leniency.
>
> The law of this state presumes that a defendant enters the special sentencing meriting leniency, that is a sentence of life in prison without possibility of parole. This presumption continues throughout the entire proceeding unless you find it has been overcome by the evidence beyond a reasonable doubt.
>
> A reasonable doubt is one for which a reason exists and may arise from the evidence or lack of evidence. It is such a doubt as would exist in the mind of a reasonable person after fully, fairly and carefully considering all of the evidence or lack of evidence . If, after such consideration, you have an abiding belief that there are not sufficient mitigating circumstances to merit leniency, then you are satisfied beyond a reasonable doubt.

15 REC 4826. Finally, mitigating circumstance (singular) was defined in Instruction No. 5 as follows:

> A mitigating circumstance is a fact about the offense or about the defendant, which in fairness or mercy may be considered in extenuating or reducing the degree of moral culpability and punishment, although it does not justify or excuse the defense.

15 REC 4827.

2. Analysis.

Jeffries argues that, given the repeated use of mitigating circumstances (plural) throughout the instructions, verdict form and statute, it was impossible for a juror to find that a single mitigating circumstance was sufficient to merit leniency. Jeffries

contends that this represents an unconstitutional limit on the right of the jury to consider any mitigating circumstance.

This argument would have more weight if the Ninth Circuit Court of Appeals had not recently considered a virtually identical issue. In *Campbell v. Kincheloe*, 829 F.2d 1453, 1456-66 (9th Cir. 1987); *cert. denied*, 109 S.Ct. 380 (1988), a defendant, on trial in Washington, presented no mitigating evidence during the special sentencing proceeding. The jury instruction and special verdict form were essentially identical to those employed in the instant action. The Ninth Circuit rejected the argument that the statute and instructions created a mandatory presumption in favor of the death penalty.

In reaching this conclusion, the Ninth Circuit emphasized that, under Washington law, the State still bears the burden of overcoming the presumption in favor of leniency, even if no mitigating evidence is presented. Moreover, the jury is free to consider any relevant factors, including those factors that may have been raised during the guilt phase of the trial. Finally, the defendant is not permitted to manufacture a "presumption of death" simply because he chooses not to present mitigating evidence. *Id.* at 1466; *see also State v. Bartholomew*, 101 Wn.2d 631 (1984).

This precise analysis is controlling in the present case. As the respondent points out, if the presumption in favor of

leniency is retained when the defendant presents no mitigating evidence, it must also be retained when the defendant presents a single piece of mitigating evidence. To conclude otherwise would create an absurd scenario.

Jeffries' argument might make sense if the burden had been on him to present evidence relating to mitigating circumstances. If that were the case, then a juror might read the verdict form as requiring more than a single mitigating factor before leniency could be found. When the jury instructions are considered as a whole, however, it is clear that the jury was more than adequately informed that: (1) the defendant entered the special sentencing proceeding with a presumption of leniency, (2) the presumption continued throughout the proceeding unless overcome by evidence beyond a reasonable doubt, and (3) the jury was free to consider any relevant mitigating factors.

Given this clearly stated presumption in favor of leniency, petitioner's argument that the jury was compelled to impose a death sentence because only a single mitigating factor was presented is without merit.

J. Claim 7.2: "Having in mind the crime".

Jeffries contends that the instruction requiring the jury to "have in mind the crime" improperly prohibited the jury from considering mitigating factors not related to the crime during the

special sentencing proceeding and therefore precluded an individualized determination of the appropriateness of the death penalty.

1. Background.

The relevant jury instructions are Nos. 3 and 5, both outlined in the previous section. Counsel for petitioner reviewed all state death penalty statutes to determine whether the statutory special interrogatory in regard to claim 7.2 is unique in the United States. The statutes researched reveal that no state death penalty statute in the United States mandates that the jury "have in mind the crime" when making its requisite individualized determination to sentence a human being to death.

2. Analysis.

The Constitution requires that a sentencer not be precluded from considering as mitigating evidence any aspect of the defendant's character and record and any of the circumstances of the offense that a defendant might offer to mitigate the sentence. *See, e.g., Lockett v. Ohio*, 438 U.S. 585 (1978); *McKenzie v. Risley*, 842 F.2d 1525, 1538 (9th Cir. 1988).

Jeffries contends that the "having in mind the crime" language contained in Instruction No. 3 forced the jury to consider only factors relating to the crime and precluded the jury from considering mitigating evidence relating to the defendant as

an individual. Other aspects of the jury instructions, however, clearly informed the jury that their discretion was not so limited.

First, the last sentence of Instruction No. 3 states that the jury, in deciding the question posed, "may consider any relevant factors." Jeffries argues that this instruction should have read "any mitigating factors." Given that the instruction directs the jury to determine whether mitigating circumstances are present, a reasonable juror could only conclude that "any relevant factors" included mitigating circumstances.

In addition, Instruction No. 5 states: "A mitigating circumstance is a fact about the offense, or about the defendant, ..." (emphasis added). This, the court believes, clearly satisfies the requirement that the jury be directed to consider as mitigating evidence any matter relating to the character or record of the defendant or the circumstances of the offense. *Penry v. Lynaugh*, 492 U.S. 302 (1989).

Claim 7.2 will be denied.

K. Claim 7.3: "Any relevant factors".

Jeffries contends that the instruction permitting the jury to consider "any relevant factors" rather than "any mitigating factors" prevented the jury from making an individualized determination of the appropriateness of the death penalty.

1. Background.

Jury Instruction No. 3 concluded by stating: "In deciding the question posed you may consider any relevant factors." This instruction is quoted in full in the discussion of claim 7.1, above.

2. Analysis.

Jeffries contends that the trial court erred by permitting the jury to consider any relevant factors, as opposed to "any relevant mitigating factors," and by failing to define "relevant factors". The Court disagrees.

First, the Court does not agree with Jeffries' assumption that, in a capital case, the sentencing authority must consider evidence of the defendant's character, record, and circumstances of the crime only as "mitigating" evidence. The Constitution permits the jury to consider non-statutory aggravating factors in reaching its sentencing decision. *Barclay v. Florida*, 463 U.S. 939, 956-58 (1983); *McKenzie v. Risley*, 842 F.2d 1525, 1541 n. 33 (9th Cir. 1988). The Washington Supreme Court has also held that the Washington Constitution permits the limited introduction of aggravating evidence at the sentencing hearing. *State v. Bartholomew*, 101 Wn.2d 631, 642-43 (1984). Thus, contrary to Jeffries' assertions, it would have been improper to instruct the jury that only mitigating factors could be considered.

Second, it is of course improper to preclude the jury from considering any mitigating evidence that the defendant wished to introduce. *McCleskey v. Kemp*, 481 U.S. 279, 306 (1987). Nothing in the instructions presented to the jury, however, limited the defense in this regard.

Moreover, it is likely that any attempt to limit the definition of "relevant factors" would have been improper. *Id.* This prohibition against attempting to define "relevant factors" makes sense because it is impossible to state in advance what evidence the defendant might wish to introduce in mitigation. Even factors such as the defendant's criminal record might -- in some contexts -- be viewed as "mitigating evidence."

Finally, the definition of "mitigating circumstance" as presented in Instruction No. 5 permitted the jury to give mitigating effect to virtually any evidence. After considering Instructions No. 3, 4, and 5 in their entirety, the Court does not believe that the jury was precluded from considering any mitigating evidence, nor was it improperly channeled to consider only certain portions of the evidence. The Court does not believe that Instruction No. 3 prevented the jury from making an individualized sentencing determination.

Petitioner's claim 7.3 will be denied.

L. Claim 7.4: Failure to Require Articulation of Mitigating Circumstances; Rational Review Impossible

Jeffries contends that the failure to require the jury to articulate what mitigating circumstances it found, and how they were weighed against the aggravating factors, violated his constitutional rights.

1. Background.

The jury in this action was not required to, and did not, specify whether it found any mitigating circumstances to exist. The jury was not required to weigh the aggravating circumstances found during the guilt phase of the trial against the mitigating circumstances, if any, found during the penalty phase.

Under the Washington death penalty scheme, the Washington Supreme Court is required, in addition to considering the direct appeal, to review any sentence of death to determine:

> (a) Whether there was sufficient evidence to justify the affirmative finding to the question posed by RCW 10.95.060(4); and
> (b) Whether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant . . . .; and
> (c) Whether the sentence was brought about through passion or prejudice.

RCW 10.95.130(2). The Supreme Court must be provided with a full record of the guilt and penalty phase of the trial, including a verbatim report of the proceedings.

2. Analysis.

Claim 7.4 contains three sub-issues: (a) should the jury have been required to specify the mitigating factors it considered and how these factors weighed against the aggravating factors; (b) could the Washington Supreme Court adequately review the sentence as required by RCW 10.95.030; and (c) was the jury required to agree unanimously on the alternatives within the aggravating circumstances?

Neither party has been able to cite to the Court any definitive case law on the first issue. It appears that no federal court has required a jury to articulate the mitigating circumstances relied upon in making a sentencing decision. The case cited by petitioner, *Smith v. McCormick*, 914 F.2d 1153 (9th Cir. 1990), is not controlling on this issue as it involved findings made by a trial judge pursuant to a specific state statutory scheme.

As the respondent points out, however, there are cases in which the United States Supreme Court has reviewed and upheld the constitutionality of capital sentencing schemes that do not require the jury to specify the mitigating circumstances it relied upon. Even in these cases this question is not directly

addressed. *See, e.g., Zant v. Stephens*, 462 U.S. 862 (1983); *Pulley v. Harris*, 465 U.S. 37 (1984). Absent a specific holding that the jury must specify what mitigating circumstances it relied upon, the Court declines to find Washington's sentencing scheme unconstitutional.

Second, Jeffries argues that because the jury was not required to articulate its findings, the Washington Supreme Court could not have properly reviewed his sentence. The Court believes this argument is without merit, for the following reasons. First, as noted above, articulated findings do not appear to be a constitutional requirement -- if such findings were a prerequisite for a reasonable appellate review, then one might expect that the United States Supreme Court would have addressed this issue. More importantly, however, the Washington Supreme Court was provided with a complete record of the trial court proceedings. The Court believes that this record is more than sufficient to enable the Supreme Court to resolve the issues it must consider pursuant to RCW 10.95.130(2). Indeed, it is conceivable that a review of the entire record by the Court is more beneficial to the defendant than a review limited to those factors found by the jury.

Third, Jeffries argues that the jury should have been required to unanimously agree on the alternatives within the

aggravating circumstances. This argument has already been considered and rejected. *See* Claim 6.4, above, and 7.9, below.

The Court will deny claim 7.4.

M. Claim 7.5: Proportionality Review

Petitioner has withdrawn his proportionality claim. The issue is therefore moot and will not be considered by the Court.

N. Claim 7.6: Ineffective Assistance of Counsel

Jeffries contends that he was denied the effective assistance of counsel during the penalty phase of his trial. This claim contains three discrete allegations: (a) that counsel failed to investigate, present and argue certain mitigating evidence to the jury; (b) that counsel acquiesced in Jeffries' "uninformed" and "unknowing" decision not to present mitigating evidence; and (c) that counsel failed to submit any penalty phase instructions and failed to object to certain language contained in one of the penalty phase instructions.[7]

1. Background.

The guilt phase verdict was returned on Saturday, November 5, 1983 at 12:31 p.m. The penalty phase, during which Jeffries was entitled to present evidence in mitigation, commenced on Monday, November 7, 1983 at 1:30 p.m. In the period between the return of the guilty verdict and the

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[7]Petitioner has abandoned a fourth ineffective assistance of counsel claim relating to the failure to present certain information to the trial judge.

commencement of the penalty phase, Jeffries -- after discussion with counsel and with his brother -- decided not to present any witnesses in mitigation.

It is defense counsel's acquiescence in this decision that lies at the heart of Jeffries' ineffective assistance of counsel claim.

The only evidence introduced at the penalty phase was certain samples of Jeffries' artwork. Defense counsel had investigated and was prepared to present a case in mitigation. Several witnesses, including Jeffries' brother, two of his nieces, and his parole officer were available and willing to testify on Jeffries' behalf.

It is also clear, from evidence submitted by petitioner supplementing this Court's evidentiary hearing, that there was a variety of additional witnesses, mostly Canadian, who would have been willing to testify on Jeffries' behalf. *See, e.g.*, affidavits of Rich (niece), Dryden (parole officer), Lattimer (art gallery owner), Pitt (fellow inmate), and Watt (friend).

In general, this testimony falls into two broad categories: (1) witnesses who would testify as to Jeffries' non-violent character, helpfulness, ability to get along with children, as well as his difficult childhood, alcoholism and drug problems, and (2) witnesses who would testify as to the value and uniqueness of Jeffries' artwork.

2. Analysis.

A claim of ineffective assistance of counsel is subject to a two-part analysis:

> First, the defendant must show that counsel's performance was deficient. This requires a showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires a showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is unreliable.

Strickland v. Washington, 466 U.S. 668, 687 (1984). The reviewing court must evaluate the reasonableness of counsel's actions "on the facts of the particular case, viewed as of the time of counsel's conduct." *Id.* at 690.

(a) **Failure to investigate mitigating evidence.** The record demonstrates that Jeffries counsel had adequately investigated Jeffries' personal history and was prepared to present a case in mitigation. The testimony of the witnesses they intended to present would have covered substantially the same ground outlined above (*i.e.*, character witnesses and testimony about the value of Jeffries' artwork). To the extent that Jeffries is arguing that counsel was ineffective in this regard, the claim is without merit.

The thrust of Jeffries' position, however, is that by failing to present any mitigation witnesses, counsel improperly

acquiesced in Jeffries' "unknowing" and "uninformed" decision not to present any mitigating evidence and in so doing failed to adequately represent Jeffries' interests.

(b) **Jeffries' decision not to present evidence.** Jeffries made his decision not to present mitigating evidence after discussions with counsel and with his brother. The initial, and most important, question is whether Jeffries made a knowing and informed decision. After having reviewed the record and having heard the testimony at the evidentiary hearing of defense counsel Sowa and Mestel, the Court concludes that he did.

Defense counsel Mestel told the trial court that:

> Mr. Sowa and myself both believe that our client is perfectly competent and that [it] is his personal decision after a weekend of soul searching, which has caused him to elect this course of actions. While we may not join in it, we believe that the decision is personal enough and made knowingly, voluntarily and intelligently that, as his counsel, we have no choice but to adhere to his wishes.

11 REC 3585-86. Both defense counsel repeated their belief that Jeffries' decision was knowingly and voluntarily made at the evidentiary hearing.

Perhaps the best evidence of the nature of this decision comes from Jeffries himself. While Jeffries has not testified under oath on this issue, he did speak to the judge in open court and also make an allocution to the jury at the sentencing phase of the trial. Jeffries told the trial judge:

> I still stand that I am innocent and I believe it and I have no reason to even ask God's forgiveness because I have done nothing and I certainly don't see any reason to beg for the jury or anybody else because I am innocent and that is how I stand and therefore I don't want to put my loved ones, like my relatives and friends, bring them up here and put them through this when I believe strongly that there is no valid reason to do so.

11 REC 3587. Jeffries essentially repeated this position in his allocution to the jury. 11 REC 3592-95. These statements, the Court believes, clearly demonstrate that Jeffries had articulable and reasonable grounds for declining to present mitigation witnesses.

Jeffries believed he was innocent and that presenting mitigation evidence might indicate a sense of guilt. In addition, he clearly wanted to protect individuals that he cared about from having to testify in court. These reasons -- which other people might or might not agree with -- are certainly a valid basis for declining to present mitigation witnesses. Absent any other evidence suggesting that Jeffries' was not competent to reach this decision, this Court will find Jeffries' decision to have been freely made.

The question now becomes, even assuming a conscious decision by Jeffries, were defense counsel bound to abide by his choice? On appeal, Jeffries is arguing that counsel erred in acquiescing with this decision and ought to have presented a case

in mitigation despite Jeffries' stated desire not to do so. The Court does not agree.

To begin with, it is clear that Jeffries retained a measure of personal control over his defense. *See, e.g., State v. Jones*, 99 Wn.2d 735, 740 (1983) (defendant has constitutional right to broadly control his own defense). The Court believes that this measure of control includes, at a minimum, the right to decide whether to present a mitigation defense.

Jeffries argues, however, that because the decision not to present mitigating evidence was not "tactical" in nature, defense counsel were not bound to follow it. Counsel derives this proposition from the "informed strategic choice" language quoted in *Strickland*, 466 U.S. at 689 (quoting *Michel v. Louisiana*, 350 U.S. 91, 101 (1955)). A review of *Strickland*, however, reveals that it does not speak in terms of tactical or non-tactical decisions, but in terms of a presumption that defense counsel has "rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment." *Id.* at 690 (emphasis added).

Jeffries also relies on the American Bar Association Standards for Criminal Justice (1980) to support his belief that defense counsels' actions were unreasonable and that they ought to have presented a mitigation case. As the Court in *Strickland* pointed out, however, the ABA Standards "are guides to

determining what is reasonable, but they are only guides." *Id.* at 688.

A review of the ABA standards demonstrates how difficult it is to apply these guides in a specific situation. After setting forth the proposition that defense counsel is not the defendant's alter ego, but a professional representative of the defendant, the Standards provide the following advice:

> The decisions as to what witnesses to call, whether and how to conduct cross-examination, what jurors to accept or strike, what trial motions to be made, and all other strategic and tactical decisions are to be the exclusive province of the lawyer after consultation with the client.

Standard 4-5.2(b). None of these specifics, however, parallels the situation in the present case. Jeffries' decision not to present a case in mitigation presents a much more fundamental question -- one which simply is not equivalent to the choice of cross-examining a witness or striking a juror.

Ultimately, the Court believes that the paradigm suggested by Jeffries is unworkable -- it requires both defense counsel and the courts to intervene and attempt to determine what is in the best interest of the client on a very basic level. As such it opens up an avenue of appeal in virtually every case.[8]

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[8]It is axiomatic that, had defense counsel presented mitigation witnesses over Jeffries' objections, an ineffective assistance of counsel appeal would have been made.

Rather than adopt this analysis, the Court finds that defense counsels' choice to abide by Jeffries' informed decision was reasonable. As such the first prong of the *Strickland* test has not been satisfied and the Court concludes that defense counsels' performance was not constitutionally defective.

(c) Penalty phase instructions. Jeffries contends that defense counsel erred by failing to submit any penalty phase instructions and failing to object to certain language contained in one of the penalty phase instructions. This argument has not been vigorously pursued and it is difficult to find much support for this aspect of the claim.

First, although there appears to have been some confusion as to whether Jeffries' proposed instructions were submitted to the Superior Court Clerk, it is clear from the record that defense counsel did submit penalty phase instructions, some of which were incorporated by the trial court. 11 REC 3598-99; 3588; 3559.

Second, Jeffries apparently believes that defense counsel failed to object to the wording of Instruction No. 3. The defense, however, specifically objected to this instruction and requested that the trial court delete the enumerated mitigating circumstances. This request was granted by the trial court. 11 REC 3591.

The Court will deny Jeffries' claim for relief number 7.6.

O. Claim 7.7: Waiver of Right to Counsel

Jeffries contends that did not make a "knowing and intelligent" waiver of his right to counsel.

1. **Background.**

The background to this claim is identical to that outlined in the previous section, claim 7.6.

2. **Analysis.**

Jeffries argues that he waived his right to counsel by participating in a "management" decision and instructing his attorneys not to call mitigation witnesses. This argument is without merit. The Court has already found that Jeffries' decision not to present mitigating witnesses was made knowingly and voluntarily. Thus, the crux of Jeffries' waiver claim is not present.

Moreover, it is not clear at all that this is a situation in which a defendant has relinquished has right to counsel and elected to represent himself pro se. Rather, Jeffries simply was engaged in directing the course of his defense. To characterize this as a waiver of the right to counsel is, in respondent's words "novel."

The Court will deny claim 7.7.

P. Claim 7.8: Prosecutorial Misconduct

Jeffries contends that the prosecutor's unconstitutional comments during his penalty phase closing argument compel a reversal of the sentence.

1. Background and analysis.

The standard for reviewing whether a prosecutor's closing argument violates due process is set forth in *Campbell v. Kincheloe*, 829 F.2d 1453 (9th Cir. 1987). The Court in *Campbell* stated:

> We agree that "[i]t is of vital importance to the defendant and to the community that any decision to impose the death sentence be, and appear to be, based on reason rather than caprice or emotion." Every argument which stirs the emotions of the jury, however, does not render a sentencing proceeding unconstitutional. The Supreme Court has expressly approved the use of "open and far-ranging argument" during a capital sentencing proceeding. "We think it desirable for the jury to have as much information before it as possible when it makes the sentencing decision." What is important is a "focus on the particularized crimes and the defendant."
>
> Mere improper argument does not necessarily violate a defendant's constitutional rights. An "examination of the entire proceedings" must be made to determine whether the prosecutor's remarks rendered the proceedings "fundamentally unfair."

Id. at 1457 (citations omitted).

Each of the grounds raised in this claim by petitioner is considered below.

(a) **Prosecutor's comment on petitioner's failure to testify.** Pursuant to Washington State Superior Court Criminal Rule 7.1(a)(1), Jeffries made an allocution to the jury. 11 REC 3575-77. In response, the prosecuting attorney opened his closing argument with the following statement:

> Well, you have heard the defendant in a situation where he does not have to take an oath and in a situation that I can't cross-examine him and his statement, I submit is one that is insulting to the intelligence. It is also a statement, I think, full of arrogance.

11 REC 3600. Defense counsel offered no objection or curative instruction in response to the statement.

Simply put, the Court does not believe that this statement -- which for all its hyperbole only points out an obvious fact that an allocution is not the same as testimony under oath -- is so outrageous that it rendered the proceedings fundamentally unfair. The Court agrees with the Washington Supreme Court's conclusion that, at worst, the prosecutor's statement amounts to a rebuttal of Jeffries' contention that he was telling the truth. *Jeffries I*, 105 Wn.2d at 416.

(b) **Prosecutor's comment on petitioner's potential for appeal and due process rights.** The prosecutor made the following comments during closing argument:

> Ladies and Gentlemen, Mr. Mestel, when he talks to you about what you're about to decide, he speaks in terms of killing. I think he asked you to, he asked you to say I will not kill him. Why does he do that? Why does he use the word kill. Because he's attempting to equate your decision-making with what this defendant did. I mean, this defendant killed brutally and without mercy. If you decide that the death penalty is appropriate and, I submit it is, there is no comparison to the killing that he did and your decision that he should receive the death peanlty. This man was arrested and was given due process of law. Phil Skiff and Inez Skiff didn't get due process of law. This man got a fair trial. He got two attorneys. He got resources, he got the benefit, everything that out [sic] system gives to a defendant, everything, and he got a fair trial and he will get more than that. He will get appeals, you name it, because that is our system and this system has treated him fairly. Something that he didn't do -- he killed unmercifully, but our system gives him due process of law so don't think that you're killing him because you're giving him the law and you're giving him justice.

11 REC 3608-09.

Again, the Court, having reviewed the closing arguments of both parties and the record as a whole, does not believe that this statement renders the trial fundamentally unfair.

First, the comments were made in the face of defense counsel's repeated statements that it was the jury's responsibility to make the decision about whether Jeffries should live or die. 11 REC 3577-79. To the extent that the prosecutor's invoked an emotional response, it must be judged in this context.

More importantly, however, the penalty phase instructions make it abundantly clear that the ultimate responsibility for imposing the death sentence lies with the jury. The prosecutor's passing reference to the fact that Jeffries was entitled to an appeal -- a fact of which the jurors were undoubtedly aware -- cannot reasonably be said to confuse the jury as to the nature of its responsibility in this regard.

(c) Prosecutors comment that jury should "ignore the law." The prosecutor stated during his closing argument that:

> This man was arrested and give due process of law. Phil Skiff and Inez Skiff didn't get due process of law . . . [H]e killed unmercifully, but our system gives him due process of law.

11 REC 3609.

The Court does not believe that this is an improper "eye for an eye" argument.

(d) Prosecutor's opinion on petitioner's guilt. The prosecutor stated:

> Well, ladies and gentlemen, you did the right thing [in returning a guilty verdict at the guilt phase]. You did the right thing . . .

11 REC 3600. Because this comment was after the jury had already returned its guilty verdict, the Court does not believe that it improperly influenced the jury's sentencing decision or rendered the sentencing phase fundamentally unfair.

For the reasons outlined above, the Court will deny petitioner's claim 7.8.

Q. Claim 7.9: Failure to Require Unanimous Verdict

Petitioner argues that the trial court's penalty phase instructions were constitutionally deficient because they failed to instruct the jury that it must consider the two murder counts as if they were separate trials.

This claim is identical to claim 6.4 (failure to require unanimous verdict, guilt phase) and petitioner relies on his prior analysis for its support. For the same reasons outlined in the discussion of claim 6.4, the Court will deny this claim for relief.

R. Claim 7.10: Trial Judge Report

Jeffries contends that because the report of the trial judge was prepared without any opportunity for him to be heard and contained certain errors or omissions, his death sentence was unconstitutional.

1. Background.

RCW 10.95.120 requires that in all cases in which an individual is convicted of aggravated first degree murder, the trial court shall prepare a report for submission to the clerk of the Washington Supreme Court. The report is to contain information concerning the defendant, the trial, the special sentencing proceeding, the victims, the representation of the defendant, "general considerations" and the chronology of the

case. The report is informational and factual in nature and is intended to assist the Supreme Court in its proportionality review of the sentence.

The report is prepared after the trial and imposition of the sentence. The trial court is required to complete a standard questionnaire. Importantly, defense counsel were asked by the trial judge to provide information to be used in the trial judge's report, but did not do so. 16 REC 4947. Petitioner had another opportunity to respond to the report when it was submitted to both parties and the Supreme Court. Again, the record indicates that petitioner has not attempted to supplement the report.

2. Analysis.

On the record before it, the Court declines to find the petitioner's constitutional rights were violated by the preparation or content of the trial judge report. First, petitioner did not even attempt to provide the trial judge with the information which he now claims is essential to the validity of the report. Having passed up the opportunity to do so, petitioner's complaints carry little weight.

Second, the trial judge report has no impact on the guilt of the petitioner or the sentence he receives. Its primary purpose is to assist the Supreme Court in conducting its proportionality review. Petitioner, however, has specifically abandoned his proportionality claim for relief (claim 7.5, above). Thus, even

assuming the trial judge's report contained errors or omissions, there is clearly no prejudice to the defendant.

To the extent that the trial judge report is used by the Supreme Court to evaluate whether there is sufficient evidence to justify the jury's penalty phase verdict or whether the sentence was brought about through passion or prejudice (unlikely given the nature of the information in the report), its impact is completely diluted by the fact that the Supreme Court has the entire trial court record available for review.

The Court will deny claim 7.10.

CONCLUSION

THEREFORE, for the reasons outlined above, respondent James Blodgett's motion for summary judgment is GRANTED. Patrick James Jeffries' petition for habeas corpus relief is DENIED.

The Court's July 6, 1990 Order staying execution is hereby DISSOLVED.

The Clerk of the Court is directed to send certified copies of this Order to all counsel of record and to James Blodgett, Superintendent, Washington State Penitentiary.

DATED this 5th day of September, 1991.

CAROLYN R. DIMMICK
United States District Judge

APPENDIX C

FOR PUBLICATION

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 91-36017
D.C. No. CV-90-00925-CRD

OPINION

PATRICK JAMES JEFFRIES,

Petitioner-Appellant,

v.

JAMES BLODGETT, Superintendent,

Respondent-Appellee.

Appeal from the United States District Court
for the Western District of Washington
Carolyn R. Dimmick, District Judge, Presiding

Argued and Submitted
May 12, 1992 -- San Francisco, California

Filed September 9, 1992

Before: Alfred T. Goodwin, Jerome Farris and
Ferdinand F. Fernandez, Circuit Judges.

Opinion by Judge Goodwin

SUMMARY

Individual Rights/Constitutional Rights/Criminal Law and Procedure/Evidence/Sentencing/ Litigation and Procedure/Juries/ Habeas Corpus

Affirming a district court judgment denying habeas relief, the court of appeals held that newly discovered evidence suggesting only that some other individual might have committed the crimes in question, rather than showing that the appellant did not commit the crime, was insufficient to meet the "probability of acquittal" standard warranting federal habeas relief.

Appellant Patrick James Jeffries was convicted by a jury in Washington state court of aggravated first-degree murder and sentenced to death. Absent any eyewitness to the murders, the state produced evidence from which the jury could find that Jeffries killed two individuals, buried them, told false stories about their whereabouts and, either before or after the murders, helped himself to currency, gold, weapons and other personal property of the victims. The jury found in a special verdict two aggravating factors that, in the absence of sufficient mitigating evidence, warranted imposition of the sentence of death: That the murders were committed to conceal the commission of a crime or to protect or conceal the identity of a person committing a crime, and that the murders were committed as

part of a common scheme or plan. The Washington Supreme Court affirmed Jeffries' conviction and sentence on direct appeal, as well as denied his personal restraint petitions. The district court denied Jeffries' petition for habeas relief. Jeffries raised a number of constitutional issues covering every phase of his journey to the appeals court.

[1] Concerning the evidentiary hearing held by the district court where "newly discovered" evidence was considered and used as the basis for denying Jeffries' motion for a new trial, the court held that the mere existence of newly discovered evidence relevant to guilt is not grounds for federal habeas relief, absent a showing that the newly discovered evidence would probably have resulted in Jeffries' acquittal. Evidence suggesting only that some other individual might have committed the crimes in question, rather than showing that Jeffries did not commit the crime, was insufficient to meet the "probability of acquittal" standard. In addition, Jeffries had already received a fair and full hearing on state court concerning this evidence. [2] Neither did the district court err in refusing to allow expert testimony that reasonable jurors would have interpreted the jury instructions and special verdict form in an unconstitutional manner. [3] Also, Jeffries' constitutional right to due process was not violated because the state trial court prepared a trial report for use by the state supreme court in its proportionality

review without giving Jeffries the opportunity to be heard. [4] Neither could the court presume prejudice in this case from media publicity surrounding the trial. The nature of the news coverage was factual and not inflammatory. While there was a substantial amount of publicity, the bulk of it occurred six months before jury selection. [5] There was also no actual prejudice in this case. It was immaterial that almost all of the jurors heard or read about the case prior to trial, because all jurors swore under oath that they could impartially judge Jeffries' guilt or innocence. [6] The prosecutor's comment on Jeffries' right to remain silent during Jeffries' right of allocution, his opinion as to Jeffries' guilt, and the alleged comment of "an eye for an eye" did not render the trial fundamentally unfair. [7] Testimony from a witness about Jeffries' previous imprisonment also did not render Jeffires' trial fundamentally unfair. First, the statement was inadvertent and not a prosecutorial attempt to elicit otherwise inadmissible evidence. In addition, the trial court's remedial instruction to the jury cured any possible prejudice caused by the incident.

[8] The court rejected Jeffries' testimony that the aggravating circumstances found by the jury could not be proven by the use of circumstantial evidence. [9] Concerning the definitions of the elements which make up the aggravating circumstances, the court held that no special instruction was

necessary to indicate the mens rea requirements of these circumstances as they applied in this case. The definitions used were not unconstitutionally vague.

[10] The trial court did not err in failing to give specific unanimity instructions to the jury. The jury needed only unanimously to agree that the murders were committed to conceal some crime or as part of some common scheme or plan. The special verdict form in this case showed that the jurors were unanimous as to these specifics of the crime. [11] Concerning juror unanimity at the sentencing phase, the court noted that jurors in Washington are not required to be unanimous as to the appropriateness of the death penalty for each murder in a multiple-murder trial. They need only be unanimous that the penalty is appropriate because of all of the defendant's crimes. Here, the jury was unanimous on every material question. [12] In addition, the instructions and verdict form to which Jeffries objected could not plausibly be read as precluding the jury from considering a relevant mitigating circumstance should it find only one. [13] Neither could the instructions objected to be read as preventing an individualized analysis of the mitigating factors when considered in the context of the other instructions. [14] An instruction permitting the jury to consider "any relevant factors" rather than "any mitigating factors" was not ambiguous. [15] In addition, due process does not require that the sentencer

exhaustively document its analysis of each mitigating factor as long as a reviewing federal court can discern from the record that the state court did indeed considered all mitigating evidence offered by the defendant.

[16] The court also held that Jeffries' counsel did not render him inadequate assistance where Jeffries' decision not to present evidence in mitigation was informed and knowing. [17] Counsel's acquesicence in this decision was not deficient performance. [18] the court rejected the argument the Jeffries' decision to refrain from presenting evidence in mitigation was a waiver of counsel and that the trial court erred in failing to verify whether the waiver was knowing and voluntary.

COUNSEL

Brian R. Phillips, Everett, Washington, for the petitioner-appellant.

Paul D. Weisser, Assistant Attorney General, Olympia Washington, for the respondent-appellee.

OPINION

GOODWIN, Circuit Judge:

Patrick James Jeffries appeals the judgment which denied his petition for a writ of habeas corpus. he was convicted in the State of Washington and sentenced to death on two counts of

aggravated first-degree murder. The district judge carefully considered the 18 alleged constitutional violations asserted in the petition and explained, in detail, why none required federal intervention. *Jeffries v. Blodgett*, 771 F. Supp. 1520 (W.D. Wash. 1991). We agree, and affirm.

While there was no eyewitness to the murders, the state produced evidence from which the jury could find that Jeffries killed Phillip Skiff by firing seven .22 calibre bullets into is body, and killed Inez Skiff by firing ten .22 calibre bullets into her body. He then buried his victims in shallow graves on their property, and told inquiring neighbors various false stories about their whereabouts. Either before or after the murders, Jeffries helped himself to the currency, gold, weapons and other personal property of the victims. He headed for Canada, leaving a trail of stolen property and witnesses who saw him selling or attempting to sell items stolen from the Skiffs. He was also seen flashing large quantities of Canadian money shortly after the Skiffs had been murdered. The late Mrs. Skiff had recently withdrawn $30,000 in Canadian currency from her bank in Canada. That money was never found or accounted for.

On November 5, 1983, the Clallam County Superior Court jury convicted Jeffries of two counts of aggravated murder. In a special verdict, the jury also found that two aggravating factors had been proven: (1) that the murders were

committed to conceal the commission of a crime or to protect or conceal the identity of a person committing a crime, and (2) that the murders were committed as part of a common scheme or plan. Finding insufficient mitigating circumstances to warrant leniency, the jury sentenced Jeffries to death.

The Washington Supreme Court affirmed Jeffries' conviction and sentence on direct appeal. *State v. Jeffries*, 105 Wash.2d 398, 717 P.2d 722 (*Jeffries I*), *cert. denied*, 479 U.S. 922 (1986). Jeffries filed three personal restraint petitions in state court, all of which the Washington Supreme Court denied. *In re Jeffries*, 722 P.2d 99 (1986) (*Jeffries II*); *In re Jeffries*, 110 Wash.2d 326, 752 P.2d 1338, *cert. denied*, 488 U.S. 948 (1988) (*Jeffries III*); *In re Jeffries*, 114 Wash.2d 485, 789 P.2d 731 (1990) (*Jeffries IV*).

Jeffries then filed this habeas corpus petition in federal district court. The district court denied Jeffries' petition. Jeffries now appeals that denial.

We review de novo the district court's denial of habeas relief. *Dickson v. Sullivan*, 849 F.2d 403, 405 (9th Cir. 1988). However, findings of fact by the state court are entitled to a presumption of correctness under 28 U.S.C. § 2254(d), *Sumner v. Mata*, 449 U.S. 539, 546-47 (1981); *Hamilton v. Vasquez*, 882 F.2d 1469, 1470-71 (9th Cir. 1989), and are reviewed for clear error. *Norris v. Risley*, 878 F.2d 1178, 1180 (9th Cir.

1989).

In his habeas petition, Jeffries raises a number of constitutional issues covering every phase of his journey to this court. With regard to the district court, Jeffries argues that the court erred in failing to grant him an evidentiary hearing on newly discovered evidence and in refusing to allow him to present certain expert testimony. Concerning the Washington State Supreme Court, Jeffries argues that it was error for that court to make use of an improper report prepared by the trial judge. Concerning his state trial, Jeffries raises a number of issues covering: (1) the form of indictment; (2) fair trial; (3) evidentiary decisions of the trial judge; (4) aggravating circumstances; (5) mitigating circumstances; and (6) ineffective assistance of counsel.

I. *Evidentiary Hearing*

Jeffries argues that the district court erred in refusing to hold an evidentiary hearing concerning "newly discovered" evidence. The evidence concerns testimony of a travel agent who worked in the same town in which the victims had lived. According to her proposed testimony, three sinister-looking people driving a car with California plates entered her travel agency on the day of the murders and asked for directions to Barr road or to the Barr Road Extension. The victims had lived on Barr Road.

The district court initially granted Jeffries' motion to hold an evidentiary hearing concerning this evidence. However, due to illness, the travel agent did not attend the scheduled hearing. Instead, her deposition was taken and the district court considered the information it contained in denying Jeffries' motion for a new trial.

A federal evidentiary hearing is mandatory if (1) petitioner's allegations, if proven, would establish the right to relief, and (2) the state court trier of fact has not, after a full and fair hearing, reliably found the relevant facts. *Van Pilon v. Reed*, 799 F.2d 1332, 1338 (9th Cir. 1986). Jeffries can meet neither burden.

[1] First, even if the travel agent's statement is true, Jeffries would not be entitled to relief. The mere existence of newly discovered evidence relevant to guilt is not grounds for federal habeas relief -- more is needed. *Townsend v. Sain*, 372 U.S. 293, 317 (1963); *Gordon v. Duran*, 895 F.2d 610, 614 (9th Cir. 1990). Jeffries must show that the newly discovered evidence would probably have resulted in his acquittal. *Gordon*, 895 F.2d at 614-15; *Quigg v. Crist*, 616 F.2d 1107, 1112 (9th Cir.), *cert. denied*, 449 U.S. 922 (1980). Evidence which suggests only that some other individual *might* have committed the crime rather than showing that the defendant did not commit the crime is insufficient to meet the "probability of acquittal"

standard. *Quigg*, 616 F.2d at 1112. Jeffries' proffered evidence shows only that other persons were in the vicinity of the scene of the crime, not that they had any connection with the crime.

Second, Jeffries has already received a full and fair hearing in state court concerning this evidence. *See Jeffries IV*, 789 P.2d at 737.

II. *Expert Testimony*

[2] Before the district court, Jeffries attempted to call to the stand psychologists who were to testify that reasonable jurors would have interpreted the jury instructions and special verdict form in an unconstitutional manner. Jeffries argues that, in refusing to allow him to introduce such expert testimony, the court committed error. We find no error. *See McDougall v. Dixon*, 921 F.2d 518, 532-33 (4th Cir. 1990), *cert. denied*, ___ U.S. ___, 111 S.Ct. 2840 (1991).

III. *Trial Judge Report*

[3] Jeffries argues that his constitutional right to due process was violated because the state trial judge prepared a trial report for use by the State Supreme Court in its proportionality review without giving Jeffries the opportunity to be heard. Jeffries' argument fails for two reasons.

First, the trial judge twice asked trial counsel for Jeffries to contribute toward preparation of the report but counsel failed to do so.

Second, because the trial judge report is used primarily for proportionality review, not for determining guilt or the sentence, and because Jeffries does not make a proportionality claim, he has suffered no prejudice by the use of the report. Even if the State Supreme Court uses this report to evaluate the evidence justifying the guilty verdict or to support the imposition of the death penalty, the entire trial record is available to fill in gaps that may exist in the report.

IV. *Prosecution by Indictment*

Jeffries argues that Washington's failure to prosecute this capital case by indictment violated his constitutional rights guaranteed by the Fifth, Eighth, and Fourteenth Amendments. Indictment by grand jury is not part of the due process guarantees of the Fourteenth Amendment that apply to state criminal defendants. *Hurtado v. California*, 110 U.S. 516 (1884), *recently affirmed by Rose v. Mitchell*, 443 U.S. 545, 557 n.7 (1979). This rule has been applied to Washington's state practice of prosecution by information. *Gaines v. Washington*, 277 U.S. 81 (1928). Accordingly, Jeffries' argument fails.

V. *Fair Trial*

Jeffries argues that his right to a fair trial was violated due to: (1) prejudicial media publicity; (2) juror misconduct; and (3) prosecutorial misconduct.

A. *Prejudicial Publicity*

Jeffries argues that he was denied a fair trial because the media publicity surrounding the trial prejudiced the jurors against him. He argues that the trial judge erred in failing to change the venue of the case.

The murders in this case occurred in Clallam County, Washington, population 50,000 (36,250 of whom were eligible for juror duty; 16,400 households). The *Port Angeles Daily News*, a county newspaper with a circulation of about 13,000, provided primary coverage of the murders.

The murders were discovered on April 2, 1983. The *Daily News* ran nine stories on the murders between April 4 and April 19, as well as three more stories in the first two weeks of May. Both the *Seattle Post-Intelligencer* and the *Seattle Times* ran single articles regarding the murders shortly after their discovery. KOMO Television reported on the murder story for eight of the days between April 4 and 15. KING Television carried stories on April 4, 5, and 15.

The news coverage included: (1) details of Jeffries' Canadian criminal history; (2) the sheriff's statement that Jeffries was armed and dangerous and that the murders were premeditated; (3) details about the nature of the murders; (4) details of Jeffries' arrest; and (5) other details concerning the progress of the investigation.

Jury voir dire was conducted between October 3 and

October 19.

On habeas review, this court must "make an independent review of the record to determine whether there was such a degree of prejudice against the petitioner that a fair trial was impossible." *Bashor v. Risley*, 730 F.2d 1228, 1234 (9th Cir.), *cert. denied*, 469 U.S. 838 (1984). This court must independently examine the news reports for volume, content, and timing to determine if they were prejudicial. *Harris v. Pulley*, 885 F.2d 1354, 1360 (9th Cir. 1988). Whether a jury was biased is a question of fact. The trial judge's finding on this question is entitled to a presumption of correctness. *Lincoln v. Sunn*, 807 F.2d 805, 814-15 (9th Cir. 1987).

Defendants enjoy the right of due process to be tried by "a panel of impartial, 'indifferent' jurors." *Irvin v. Dowd*, 366 U.S. 717, 723 (1961). If prejudicial pretrial publicity makes it impossible to seat an impartial jury, then the trial judge must grant the defendant's motion for a change of venue. *Harris*, 885 F.2d at 1361. The prejudice requirement will be satisfied by a finding of: (1) presumed prejudice; or (2) actual prejudice.

1. *Presumed Prejudice*

"Prejudice is presumed when the record demonstrates that the community where the trial was held was saturated with prejudicial and inflammatory media publicity about the crime." *Harris*, 885 F.2d at 1361. Courts rarely find presumed

prejudice because "saturation" defines conditions found only in extreme situations. *Id.*

[4] We cannot presume prejudice in this case. We agree with the trial judge and the district court that the nature of the news coverage was factual, and not inflammatory. Moreover, although there was a substantial amount of publicity, the bulk of it occurred six months before jury selection in the case.

2. *Actual Prejudice*

Actual prejudice exists if the jurors demonstrated actual partiality or hostility that cannot be laid aside. *Harris*, 885 F.2d at 1363. "[J]urors need not, however, be totally ignorant of the facts and issues involved." *Murphy v. Florida*, 421 U.S. 794, 800 (1975).

[5] We find no actual prejudice in this case. First, it is immaterial that almost all of the jurors had heard or read about the case prior to trial. All of these jurors swore under oath that they could impartially judge Jeffries' guilt or innocence.

Moreover, of the 180 venire members, at most 14 were excused, either for cause or peremptorily, because of potential prejudice. Excusing 14 out of 180 venire members for prejudice does not indicate actual prejudice of jurors. *See Murphy*, 421 U.S. at 803 (no prejudice found where 20 out of 78 venire members excused due to partiality). Jeffries points to no aspect of the five volume voir dire transcript in arguing that actual

prejudice existed.

B. *Juror Misconduct*

Jeffries argues that he was denied a fair trial because one of the jurors in the case informed the other jurors that Jeffries was a convicted armed robber. The trial judge had excluded evidence of Jeffries' prior convictions during the guilt and penalty phases of the trial.

Two years after Jeffries was sentenced, two jurors filed affidavits concerning juror conduct during the trial. In his affidavit, juror Thomas Tyszko stated that, during the guilt phase, juror Erin Thomas announced to the jury that "Jeffries is a convicted armed robber . . . oh we're not supposed to know that are we?" Tyszko stated that he had ignored the comment.

In her affidavit, juror Kathleen Sims claimed that, during the penalty phase, Thomas told the jury that Jeffries "had a record." Sims stated that someone, perhaps herself, responded that Jeffries' criminal record was irrelevant.

Thomas denied making the statements or even that he had heard Jeffries had a record. Eight of the twelve jurors swore that they did not hear anyone refer to Jeffries' criminal record or make such statements themselves.

In assessing whether the alleged introduction of extrinsic evidence constitutes reversible error, this court will consider the following factors:

> (1) whether the extrinsic material was actually received, and if so, how; (2) the length of time it was available to the jury: (3) the extent to which the jury discussed and considered it; (4) whether the extrinsic material was introduced before the verdict was reached, and if so, at what point in the deliberations it was introduced; and (5) any other matters which may bear on the issue of the reasonable possibility of whether the introduction of extrinsic material affected the verdict.

Bayramoglu v. Estelle, 806 F.2d 880, 887 (9th Cir. 1986).

The juror affidavits in this case do not serve as grounds for finding constitutional error. According to the affidavits, at most three jurors "received" the extrinsic evidence. Second, Thomas' remarks were made only in passing, if at all. Third, the affidavits demonstrate that the jury did not discuss Thomas' alleged remarks. Finally, although the extrinsic evidence was introduced prior to a verdict being reached, the only jurors who testified that they had received the information indicated that it was not a factor in their decisions in the case. Residual memory of pretrial information is generally dealt with in voir dire, and jurors are entitled to be believed when they say that such information will not affect their ability to decide the case on the evidence presented in court.

C. *Prosecutorial Misconduct*

Jeffries argues that a number of statements made by the prosecutor to the jury during closing argument deprived him of

a fair trial.

We review remarks by the prosecution in a capital case to determine if they rendered the proceedings fundamentally unfair. Improper argument does not, per se, violate a defendant's constitutional rights. *Darden v. Wainwright*, 477 U.S. 168, 181 (1986); *Campbell v. Kincheloe*, 829 F.2d 1453, 1457 (9th Cir. 1987), *cert. denied*, 488 U.S. 948 (1988). Moreover, we review for plain error prosecutorial comments to which a defendant fails to object. *United States v. Endicott*, 803 F.2d 506, 513 (9th Cir. 1986).

1. *Comment on Jeffries' Right to Remain Silent*

Washington state law provides a right of allocution to the defendant to make a statement during the closing arguments which is not subject to direct or cross-examination. Wash. State Sup. Ct. Crim. R. 7.1(a)(1). Jeffries exercised this right and indicated that he was not guilty of these murders and refused to beg for mercy for crimes he did not commit. In response, the prosecution said in his closing argument:

> Well, you have heard the defendant in a situation where he does not have to take an oath and in a situation that I can't cross-examine him, and his statement, I submit, is one that is insulting to the intelligence. It is also a statement, I think, full of arrogance.

Defense counsel did not object to this statement and did not offer a curative instruction in response.

The Fifth Amendment prohibits the prosecutor from commenting to the jury on the defendant's failure to take the stand in his own defense. *Griffin v. California*, 380 U.S. 609, 615 (1965). However, such commentary mandates reversal only if: (1) the commentary is extensive; (2) an inference of guilt from silence is stressed to the jury as a basis for the conviction; and (3) where there is evidence that could have supported acquittal. *Lincoln v. Sunn*, 807 F.2d 805, 809 (9th Cir. 1987).

[6] The comment in this case does not create error, much less constitutional error. We agree with the Washington State Supreme Court that the comment constituted, at worst, a rebuttal of Jeffries' contention that he was telling the truth. *See Jeffries I*, 717 P.2d at 722. Moreover, the comment was a single, isolated incident rather than an extensive tactic by the prosecution.

2. *Caldwell Claim and Eye for an Eye*

In his closing argument, the prosecutor said:

> Phil Skiff and Inez Skiff didn't get due process of law. This man got a fair trial. He got two attorneys. He got resources, he got the benefit, everything that our system gives to a defendant, everything, and he got a fair trial and he will get more than that. *He will get appeals*, you name it, because that is our system and this system has treated him fairly. Something that he didn't do -- he killed unmercifully, but our system gives him due process of law so don't think that you're killing him because you're giving him the law and you're giving him justice.

Jeffries argues that, in making this statement, the prosecutor impermissibly led the jury to believe that the responsibility for imposing the death sentence did not lie with them. Jeffries relies on *Caldwell v. Mississippi*, 472 U.S. 320 (1985). Moreover, Jeffries argues that the statement constituted an impermissible "eye for an eye" argument.

Jeffries' arguments are not persuasive. The prosecutor's passing reference to Jeffries' right to appeal did not indicate to the jury that it was relieved of its responsibility for determining the appropriateness of the death penalty. Jurors know that cases can be appealed. Moreover, the penalty phase instruction made clear to the jury that the responsibility lay with it. Finally, the statement does not suggest that the jury ignore its legal responsibility impartially to weigh all of the evidence and to impose a death sentence as a matter of retribution.

3. *Prosecutor's Opinion as to Guilt*

Finally, Jeffries argues that the prosecutor improperly informed the jury of his personal opinion as to Jeffries' guilt. After the jury had returned a guilty verdict in which it found the presence of two aggravating circumstances, the prosecutor told the jury: "Well, ladies and gentlemen, you did the right thing. You did the right thing . . . ." Because the prosecutor made his statement after the jury returned its verdict, the statement could

not have affected the jury's decision. The statement did not render the trial fundamentally unfair. *See United States v. Gwaltney*, 790 F.2d 1378, 1383 (9th Cir. 1986) *cert. denied*, 479 U.S. 1104 (1987).

VI. *Evidentiary Claims*

Jeffries argues that certain evidentiary errors made by the trial judge warrant reversal.

Federal habeas will not lie for errors of state law. *Estelle v. McGuire*, ___ U.S. ___, 112 S. Ct. 475, 480 (1991). Habeas relief is available for wrongly admitted evidence only when the questioned evidence renders the trial so fundamentally unfair as to violate federal due process. *Id.*; *Butcher v. Marquez*, 758 F.2d 373, 378 (9th Cir. 1985).

A. *Jeffries' Previous Imprisonment*

Jeffries argues that his trial was rendered fundamentally unfair when a prosecution witness referred to Jeffries' prior history of imprisonment in Canada. When asked by the prosecution when he had first heard of Jeffries, the witness responded: "It was when I met Phil and Inez in Chilliwack that he [Jeffries] used to do carving and things like that when he was in jail somewhere in Canada." finding that the response was inadvertent and had not been intentionally elicited by the prosecutor, the trial judge denied the defense motion for a mistrial. The judge directed the jury to disregard the

prosecutor's question and the witness' response.

[7] We do not believe that the above testimony rendered Jeffries' trial fundamentally unfair. First, the statement was inadvertent and not a prosecutorial attempt to elicit otherwise inadmissible evidence. Moreover, the trial court's remedial instruction to the jury cured any possible prejudice caused by the incident.

B. *Weapons Evidence*

Jeffries argues that the admission of evidence related to weapons possession was contrary to a Washington state rule of evidence and violated his due process rights. At trial, the trial judge allowed the prosecution to introduce evidence showing that jeffries had been seen with certain rifles, bullets, and handguns. Jeffries argues that this evidence constituted, under Washington law, impermissible character evidence and that its introduction rendered his trial fundamentally unfair.

Jeffries' assertions of state law error are not cognizable on federal habeas. *McGuire*, ___ U.S. at ___, 112 S. Ct. at 480. Moreover, Jeffries' arguments do not establish fundamental unfairness. The evidence of which Jeffries complains was related to the crimes for which he was being prosecuted. According to the Washington State Supreme Court, the .22 caliber rifle and bullets had been stolen from the victims, the pistols could have been the murder weapon or weapons, and the

FBI had determined that the bullets could have come from the same boxes of .22 caliber bullets recovered from Jeffries' stash. *Jeffries I*, 717 P.2d at 731. These determinations are fairly supported by the record and thus warrant a presumption of correctness.

VII. *Aggravating Circumstances*

Jeffries makes a number of arguments related to the two aggravating circumstances which were found to exist in his case. The two aggravating circumstances are:

> (7) The defendant committed the murder to conceal the commission of a crime or to protect or conceal the identity of any person committing a crime.
>
> (8) There was more than one victim and the murders were part of a common scheme or plan or the result of a single act of the defendant.

Wash. Rev. Code §§ 10.95.020(7),(8).

Jeffries' aggravating circumstances claims address: (1) the sufficiency of the evidence; (2) the definitions of the circumstances; and (3) juror unanimity.

A. *Sufficiency of the Evidence*

Jeffries argues that the evidence in the case was insufficient to establish the existence of either aggravating circumstance. He argues that circumstance (7) requires a finding that the defendant contemplated the commission of a crime prior

to committing the murders. Because, Jeffries contends, the trial produced no evidence concerning his motives prior to the killings, circumstance (7) could not have been made out. Similarly, with respect to circumstance (8), Jeffries argues that no evidence demonstrated that he had conceived of some plan concerning the murders prior to their commission.

Evidence supporting aggravating circumstances findings is sufficient if "'viewing the evidence in a light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.'" *Lewis v. Jeffers*, 497 U.S. 764, ___, 110 S. Ct. 3092, 3103-04 (1990) (quoting *Jackson v. Virginia*, 443 U.S. 307, 319 (1979)).

[8] At bottom, Jeffries is arguing that aggravating circumstances (7) and (8) cannot be proven by the use of circumstantial evidence. This assertion is incorrect. *See United States v. Hernandez*, 876 F.2d 774, 777 (9th Cir.), *cert. denied*, 493 U.S. 863 (1989). Sufficient circumstantial evidence exists for a rational jury to find beyond a reasonable doubt that Jeffries had killed the Skiffs to facilitate robbing them. Evidence introduced at trial showed, *inter alia*, that: (1) Phil Skiff had been shot twice in the back of the head "gangland style" and five times in the body; (2) after the murders, Jeffries tried to sell the Skiffs' T.B. and some placer gold; (3) Jeffries was seen flashing large amounts of Canadian money after the murders -- Inez Skiff

had withdrawn $30,000 in Canadian currency shortly before her murder and that money has never been recovered; and (4) shortly after the murders, Jeffries left the victims' home with their truck, chain saw, T. V., guns, and other items.

B. *Definitions of the Elements*

Jeffries makes two arguments concerning the elements which make up aggravating circumstances (7) and (8). First, Jeffries contends that these circumstances contain the following elements: (1) a particular crime that was being concealed; (2) a particular plan or scheme; and (3) a specific mental state with respect to the circumstances. Jeffries argues that the trial judge erred in failing to instruct the jury as to the particular crime he was concealing, the plan he was acting in accordance with, and the mens rea with which he concealed a crime or hatched the plan.

The problem with this argument with respect to items (1) and (2) is that these items are not elements of circumstances (7) and (8) as defined by the Washington Supreme Court. The prosecution need prove only those elements of the crime which are included in the definition of the offense. *Patterson v. New York*, 432 U.S. 197, 210-211 (1977). In *Jeffries I*, the Washington Supreme Court made clear that, with respect to circumstance (7), "[t]he specific crime need not be stated." *Jeffries I*, 717 P.2d at 735. Similarly, the "common scheme or

plan" from circumstance (8) is "simplistic" and "needs no definition." *Id.* Because it is the sole responsibility of the States to define the elements of their criminal offenses, *see, e.g., Martin v. Ohio*, 480 U.S. 228, 232 (1987), Jeffries' first argument fails with respect to the definition of "crime" and "plan or scheme."

[9] Concerning item (3), the mens rea requirement, the Washington Supreme Court has found that "[i]t is impossible for a jury to find both aggravating circumstances without also finding that the defendant intended to commit them." *Jeffries I*, 717 P.2d at 735. This is true with respect to killing in order to conceal a crime and killing as part of a plan or scheme. Both presuppose some purpose on the part of the defendant. Accordingly, no special instruction was necessary to indicate the mens rea requirements of the circumstances as they applied in this case.

Second, Jeffries seems to argue that the terms "crime" and "plan or scheme" are unconstitutionally vague. According to the Supreme Court, capital sentencing schemes must not contain vague elements. Capital sentencing standards must provide a meaningful basis for distinguishing between those cases in which the death penalty is appropriate and those in which it is not. *Godfrey v. Georgia*, 446 U.S. 420 (1980). Under the teaching of *Godfrey*, the phrases "crime" and "plan or scheme,"

are not unconstitutionally vague. 446 U.S. at 427-28.

C. *Juror Unanimity*

Jeffries makes two argument that the trial judge erred in failing to give specific unanimity instructions to the jury. First, concerning the guilt phase, Jeffries argues that the judge should have given a specific unanimity instructions to each element of the aggravating circumstances charged. Because the judge failed to do so, Jeffries contends it is possible that the jurors disagreed as to what crime he was concealing in murdering the Skiffs, or the common plan or scheme under which he was acting.

Jeffries also argues that the trial judge should have given the jury a separate, specific unanimity instruction for each murder count. In other words, the judge should have told the jury that it must be unanimous as to the sentence of death for each murder. At trial, the judge submitted to the jury only one verdict form for both counts, rather than one for each.

A faulty jury instruction will constitute a violation of due process only where the instruction by itself infects the entire trial to such an extent that the resulting conviction violates due process. *Cupp v. Naughten*, 414 U.S. 141,147 (1973). Where the alleged error is the failure to give an instruction the burden on the petitioner is "especially heavy." *Henderson v. Kibbe*, 431 U.S. 145, 155 (1977).

With regard to juror unanimity, a general unanimity

instruction will normally suffice to instruct the jury that they must be unanimous as to the elements which form the basis of the conviction. *United States v. Payseno*, 782 F.2d 832, 835 (9th Cir. 1986). The exception to the general rule involves situations in which "there is a genuine possibility of jury confusion or that conviction may result from different jurors concluding that the defendant committed different acts." *United States v. Echeverry*, 719 F.2d 974, 975 (9th Cir. 1983). Juror confusion is often a genuine possibility when the nature of the evidence is complex, when there is a discrepancy between the evidence and the indictment, or some other particular factor creates such a possibility of confusion. *United States v. Frazin*, 780 F.2d 1461, 1468 (9th Cir.), *cert. denied*, 479 U.S. 844 (1986).

[10] Concerning Jeffries' first argument, none of the normal indicia of juror confusion are present. This case involved straightforward facts regarding the murders and did not include complicated legal theories or varied facts regarding different times, places, or personalities. *See Payseno*, 782 F.2d at 837. Moreover, it is irrelevant whether the jurors agreed upon the underlying "crime" or "scheme" as being murder or theft. Under the Washington statute, the specific crime is not an element that needs to be proved beyond a reasonable doubt. *Jeffries I*, 717 P.2d at 735. The findings of a crime or scheme

are merely alternative means of finding aggravated first degree murder. *See Schad v. Arizona*, ___ U.S. ___, ___, 111 S. Ct. 2491, 2501 (1991). Thus, the jury need only unanimously agree that the murder was committed to conceal *some* crime or as part of *some* common scheme or plan. The special verdict form indicates that the jurors were unanimous as to these specifics of the crime.

[11] Jeffries' second argument, concerning juror unanimity at the sentencing phase, is also without merit. As the Washington Supreme Court noted in *Jeffries I*, "[i]n a capital case, the jury is to consider not each count separately but all crimes the defendant has been convicted of in deciding whether death is the appropriate punishment." *Id.* at 735. Jurors in Washington are not required to be unanimous as to the appropriateness of the death penalty for each murder in a multiple-murder trial. They need only be unanimous that the penalty is appropriate because of all of the defendant's crimes. The jury was unanimous on every material question.

VIII. *Mitigating Circumstances*

Jeffries argues that a number of sentencing phase jury instructions prevented the jury from properly considering mitigating evidence. Jeffries also argues that the jury should have been required to specify the mitigating factors it found in his case and the weights which the jury assigned to them.

A faulty jury instruction will require the grant of a habeas petition only if the instruction by itself so infected the entire trial that the resulting conviction violates due process. *McGuire*, ___ U.S. at ___, 112 S. Ct. at 482. The instruction "'may not be judged in artificial isolation,' but must be considered in the context of the instructions as a whole and the trial record." *Id.* (quoting *Cupp v. Naughton*, 414 U.S. 141, 147 (1973)). An ambiguous instruction is reviewed to determine whether there is a reasonable likelihood that the jury has applied the challenged instruction in a way that prevents the consideration of constitutionally relevant evidence. *Id.*; *Boyde v. California*, 494 U.S. 370, 381 (1990).

A. *Multiple Circumstances and "Having in Mind the Crime"*

Jeffries makes two arguments that a particular jury instruction and verdict form were defective because they hindered the jury from performing its proper function with respect to the determination of mitigating circumstances.

The challenged instruction reads:

> Having in mind the crime of which the defendant has been found guilty, are you convinced beyond a reasonable doubt that there are not sufficient mitigating *circumstances* to merit leniency?

The verdict form reads:

> During the special sentencing proceedings, the State bears the burden of proving beyond a reasonable doubt that there are not sufficient mitigating *circumstances* to merit leniency.

Jeffries first argues that the instruction and verdict form prevented the jury from considering a single mitigating circumstance; that they required the jury to find multiple circumstances or none at all. Second, Jeffries argues that the "having in mind the crime" language prevented the jury from making an individualized determination of the appropriateness of the death penalty.

A sentencer may not be precluded from considering relevant factors in mitigation of the death penalty. *Lockett v. Ohio*, 438 U.S. 586, 604 (1978).

[12] Concerning Jeffries' first argument, the instructions and verdict form to which Jeffries points cannot plausibly be read as precluding the jury from considering a relevant mitigating circumstance should it find only one. This is especially evident given that the jury began it analysis with a presumption of leniency, Wash. Rev. Code § 10.95, and that the jury was instructed as to the definition of only one mitigating circumstance.

[13] As for Jeffries' second argument, the instruction cannot be read to prevent individualized analysis when the instruction is read in the context of the other instructions. One

instruction told the jury to consider "any relevant factors" -- this includes all evidence in mitigation. Another instruction defined a mitigating circumstance as "a fact about the offense, *or about the defendant*, ..." Thus, reading the sentencing instructions as a whole, *Boyde*, 494 U.S. at 383, 110 S. Ct. at 1199 (emphasis added), the jury was not precluded from considering any mitigating evidence.

B. *"Any Relevant Factors"*

[14] Jeffries argues that a jury instruction permitting the jury to consider "any relevant factors" rather than "any mitigating factors" is ambiguous and thus prevented the jury from making an individualized assessment of the appropriateness of the death penalty. The instruction is not ambiguous. Washington state law defines "any relevant factors" to include both mitigating and aggravating factors. *State v. Bartholomew*, 101 Wash.2d 631, 683 P.2d 1079, 1088 (1984); *State v. Campbell*, 103 Wash.2d 1, 691 P.2d 929, 944 (1983), *cert. denied*, 471 U.S. 1094 (1985). The jury was not prevented from making an individualized assessment.

C. *Failure to Articulate Mitigating Circumstances*

Jeffries argues that the jury should have been required to specify the mitigating factors and the corresponding weight that it assigned the factors in the sentencing balance. Jeffries cites *Smith v. McCormick*, 914 F.2d 1153, 1166 (9th Cir. 1990) for

the proposition that the jury must make specific findings as to all relevant mitigating circumstances, including those it finds insufficient to merit leniency. However, in *Smith* there was a specific state statute requiring the sentencing judge to make written findings as to the weight of the mitigation evidence. *Id.* No such state statute operates in Washington. *Clark v. Ricketts*, 942 F.2d 567, 574 n.5 (9th Cir. 1991), *amended on other grounds*, 958 F.2d 851 (1992), *petition for cert. filed*, May 18, 1992. Therefore, the rationale of *Smith* does not apply to this case.

[15] Furthermore, due process does not require that the sentencer exhaustively document its analysis of each mitigating factor as long as a reviewing federal court can discern from the record that the state court did indeed consider all mitigating evidence offered by the defendant. *Parker v. Dugger*, ___ U.S. ___, 111 S. Ct. 731, 736-38 (1991); *Clark*, 942 F.2d at 574. Jeffries contends that there is a *Lockett* concern, 438 U.S. at 604, that the jury may have ignored relevant mitigating evidence. However, it is clear from the record what factors the jury considered in its calculus in Jeffries' case. *See Parker*, 111 S. Ct. at 736 (assume trial judge considered all evidence because he said he did); *Clark*, 942 F.2d at 575 (statements of sentencing court that it considered all mitigating evidence satisfy demands of due process clause). The defense offered only one mitigating

factor -- artistic ability as evidenced by sculptures Jeffries had created. The special sentencing verdict form indicated that the jury found the presence of two specific aggravating circumstances, a murder committed during the commission of a crime and murder as part of a common scheme. The statements of the jury, i.e., the special verdict form and sentence of death, read in light of the record, show that the jury considered all mitigating evidence. This process satisfies the demands of the due process clause.

IX. *Ineffective Assistance of Counsel*

Finally, Jeffries argues that his counsel's representation of him was unconstitutionally defective. At trial, Jeffries persuaded his attorneys not to present any mitigating evidence. Jeffries first argues that his counsel's acquiescence in his request denied him the effective assistance of counsel. Second, Jeffries maintains that his decision not to present mitigating evidence amounted to a waiver of counsel and that the trial judge did not properly accept this waiver. Finally, Jeffries argues that his counsel failed adequately to investigate evidence in mitigation.

A. *Counsel's Acquiescence*

Jeffries' argues that his counsel's acquiescence in his "unknowing and uninformed" decision not to present any mitigating evidence constituted defective performance. Defense counsel had been prepared to present a mitigation case.

However, Jeffries, after a weekend of discussions with his brother and with counsel, decided not to present any witnesses in mitigation. Jeffries repeatedly stated the reasons for his decision:

> I still stand that I am innocent and I believe it and I have no reason to even ask God's forgiveness because I have done nothing and I certainly don't see any reason to beg for the jury or anybody else because I am innocent and that is how I stand and therefore I don't want to put my loved ones, like my relatives and friends, bring them up here and put them through this when I believe strongly that there is not valid reason to do so.

Counsel for Jeffries told the court:

> Mr. Sowa and myself both believe that our client is perfectly competent and that [it] is his personal decision after a weekend of soul searching, which has caused him to elect this course of actions. While we may not join in it, we believe that the decision is personal enough and made knowingly, voluntarily and intelligently that, as his counsel, we have no choice but to adhere to his wishes.

At sentencing the only mitigation evidence offered was the limited testimony of Jeffries' brother regarding the artistic value of Jeffries' wood sculptures.

To succeed on an ineffective assistance of counsel claim, the petitioner must demonstrate that counsel's performance was so deficient that it fell below an objective standard of reasonableness, and that the deficient performance prejudiced the

defense. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). There exists a strong presumption that defense counsel's actions were reasonable and provided constitutionally adequate assistance. *Id.* at 689.

[16] Jeffries' counsel did not render him inadequate assistance. First, Jeffries' decision not to present evidence in mitigation was informed and knowing. His own consistent words and those of his counsel support this conclusion. His unsworn denial of the crimes during his statutory allocution made his refusal to seek mitigation a logical strategy.

[17] Second, counsel's acquiescence in this decision did not constitute deficient performance. Although the ABA Standards for Criminal Justice (2d ed. 1980) offers some support to Jeffries' contention that his counsel should have presented evidence in mitigation despite his client's wishes to the contrary, the ABA Standards were only as a "guide" for determining whether an attorney's performance is adequate. *Strickland*, 466 U.S. at 688; *Jones v. Barnes*, 463 U.S. 745, 753 n.6 (1983). As the Supreme Court has recognized, "[t]he reasonableness of counsel's actions may be determined or substantially influenced by the defendant's own statements or actions." *Strickland*, 466 U.S. at 691. "Counsel's actions are usually based, quite properly, on informed strategic choices made by the defendant and on information supplied by the defendant." *Id.* Indeed, the

Eleventh Circuit has held that "when a defendant preempts his attorney's strategy by insisting that a different defense be followed, no claim of ineffectiveness can be made." *Mitchell v. Kemp*, 762 F.2d 886, 889 (11th Cir. 1985), *cert. denied*, 483 U.S. 1026 (1987).

In this case, counsel for Jeffries had been prepared to present evidence in mitigation and had discussed with Jeffries the ramifications of failing to present the evidence. Accordingly, counsel did not deprive Jeffries of effective assistance in acquiescing in the latter's considered decision.

B. *Waiver of the Right to Counsel*

[18] Also concerning his decision to refrain from presenting evidence in mitigation, Jeffries argues that this decision constituted a waiver of counsel and that the trial court erred in failing to verify that the waiver was knowingly and voluntarily made. Jeffries' argument fails because he did not waive his right to counsel. Jeffries merely participated in the direction of his own defense. *See State v. Jones*, 99 Wash.2d 735, 664 P.2d 1216 (1983). Even if the decision could be construed as a waiver, the facts of this case demonstrate that the waiver was knowingly and voluntarily made.

C. *Failure to Investigate*

Jeffries argues that his counsel failed to investigate mitigating evidence. This argument is belied by the record.

Counsel had been prepared to offer the testimony of several witnesses, including Jeffries' brother, two of his nieces, and his Canadian parole officer to show Jeffries' prior nonviolent character, difficult childhood, drug problems, and social value of his artwork. Counsel performed well in the face of a difficult client and overwhelming evidence in the prosecution's case.

AFFIRMED.

APPENDIX D

FOR PUBLICATION

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 91-36017
D.C. No. CV-90-00925-CRD

ORDER AND OPINION

PATRICK JAMES JEFFRIES,

Petitioner-Appellant,

v.

JAMES BLODGETT, Superintendent,

Respondent-Appellee.

Appeal from the United States District Court
for the Western District of Washington
Carolyn R. Dimmick, District Judge, Presiding

Argued and Submitted
May 12, 1992 -- San Francisco, California

Filed September 9, 1992
Withdrawn: March 3, 1993
Filed: March 3, 1993

Before: Alfred T. Goodwin, Jerome Farris and
Ferdinand F. Fernandez, Circuit Judges

Opinion by Judge Goodwin; Dissent by Judge Fernandez

SUMMARY

Criminal Law and Procedure/Juries/Habeas Corpus/Due Process/Defendants and Accused, Rights of/Capital Cases/Prison

The court of appeals vacated an order of the district court and remanded. The court held that, respecting a petition for habeas corpus relief by a convicted murderer sentenced to death, the district court must make a factual determination of the truth of affidavits alleging communications among jurors about the defendant's prior convictions, which had been excluded from evidence at trial.

Petitioner Patrick Jeffries was convicted for aggravated murder in Washington and sentenced to death in 1983. During both the guilt and penalty phases of the trial, evidence of prior convictions was excluded. Two years after sentencing, two jurors asserted by affidavits filed in federal court that a third juror had during each phase of the trial communicated to the other jurors that Jeffries was a convicted armed robber. The third juror denied making the statements. Eight of the twelve jurors swore they had not heard any reference to Jeffries's criminal record. The district court assumed the truth of the affidavits, although the state disputed their factual basis, and concluded that the juror misconduct, if any, did not affect the

verdict. On appeal, the court of appeals held that the district court had properly applied the relevant law, assuming, as had the district court, the truth of the affidavits. The court of appeals filed its opinion in that appeal on September 9, 1992. Jeffries petitioned for rehearing.

[1] The court noted that after the petition for rehearing was filed, it became aware of a possible conflict between its original opinion and *Dickson v. Sullivan*, 849 F.2d 403 (9th Cir. 1988), which conflict did not appear to have been briefed or argued in the district court. In *Dickson*, the court granted habeas relief where two jurors were exposed to an out-of-court communication by a deputy sheriff to the effect that Dickson had "done something like this before." Because of the similarity of the communications alleged to have been heard by two jurors in this case, the court concluded that *Dickson* required remand of this case for a factual determination as to the truth of the affidavits.

Judge Fernandez, concurring and dissenting, was of the opinion that the majority was inappropriately reversing circuit precedent by creating a per se rule that receipt of prior offense information by a jury requires overturning its verdict.

COUNSEL

Brian R. Phillips, Everett, Washington, for the petitioner-appellant.

Paul D. Weisser, Assistant Attorney General, Olympia, Washington, for the respondent-appellee.

ORDER AND DISSENT

In his petition for rehearing, Jeffries again asserts a due process violation in his state trial because of juror misconduct. We reviewed the district court's treatment of the question initially as an attempt by two jurors to impeach their verdicts by affidavits reciting misconduct in the jury room. The affidavits alleged that a juror had said, during deliberation on the guilt phase of the trial, "Jeffries is a convicted armed robber."

We agreed with the District Court that if, indeed, the alleged misconduct had occurred, the misconduct probably had no influence on the verdict. We agreed with the District Court's application of *Bayramoglu v. Estelle*, 806 F.2d 880, 887 (9th Cir. 1986). Because we held that the District court had correctly applied the *Bayramoglu* standard, neither court reached the factual accuracy of the affidavits alleging juror misconduct. The state disputed the facts alleged in the affidavits, but for the purpose of habeas review, both courts assumed the truth of the

affidavits. The state again challenges both the factual basis of the affidavits and their legal sufficiency to impeach the verdict.

[1] After the filing of the petition for rehearing, we became aware of a possible conflict between our September 9, 1992 opinion in this case and *Dickson v. Sullivan*, 849 F.2d 403 (9th Cir. 1988) which does not appear to have been briefed and argued in the district court. In *Dickson*, we granted habeas relief where two jurors were exposed to an out-of-court communication by a deputy sheriff to the effect that Dickson "had done something like this before." Because of the similarity of the communication heard by the two jurors in *Dickson*, and the communication alleged to have been made by a fellow juror to two jurors in this case, we conclude that Dickson requires a remand for a factual determination as to the truth of the juror affidavits. If the district court finds that the alleged misconduct actually occurred, then *Dickson* would appear to require a remand to the state courts.

Accordingly, Judges Goodwin and Farris have voted to grant the petition for rehearing in part, Judge Fernandez would deny the petition for rehearing.

The opinion in *Jeffries v. Blodgett*, 974 F.2d 1179 (9th Cir. 1992) is withdrawn and the attached opinion filed herewith is substituted therefor. The judgment of the district court is vacated and the case is remanded to the District Court for further

proceedings in light of *Dickson v. Sullivan, supra.* In all other respects, the petition for rehearing is denied.

FERNANDEZ, Circuit Judge, dissenting to grant of petition for rehearing:

The fact is that the district court did apply our five-part test as set forth in *Bayramoglu v. Estelle*, 806 F.2d 880, 887 (9th Cir. 1986) and specifically determined that, among other things, there was no reasonable possibility that this particular introduction of extrinsic information, if it occurred, affected the verdict. The majority believes that *Dickson v. Sullivan*, 849 F.2d 403 (9th Cir. 1988) eliminated the five-part test by elevating the mere receipt of prior offense information to what amounts to a per se rule that requires the overturning of a jury verdict. If so, that case has not only reversed circuit precedent, which it cannot do, but has also created a threat to the stability of jury verdicts that is almost incalculable. I do not believe that *Dickson* intended to do that, nor do I believe that it did.

If I am correct, the order we now issue imposes an unnecessary burden upon a conscientious district judge and just as unnecessarily impedes finality of a case involving a crime committed and a jury trial held in 1983.

If I am wrong about *Dickson*, we now leave that loose cannon free to continue its rampage across the decks of our legal

ship and put off the inevitable day when our court must confront its danger, its damage, and its conflict with *Bayramoglu*.

Thus, I dissent from the order granting rehearing.

OPINION

GOODWIN, Circuit Judge:

Patrick James Jeffries appeals the judgment which denied his petition for a writ of habeas corpus. He was convicted in the State of Washington and sentenced to death on two counts of aggravated first-degree murder. The district judge carefully considered the 18 alleged constitutional violations asserted in the petition and explained, in detail, why none required federal intervention. *Jeffries v. Blodgett*, 771 F. Supp. 1520 (W.D. Wash. 1991). We agree with the district court's resolution of all of the issues except one -- the issue of juror misconduct. We therefore vacate and remand.

While there was no eyewitness to the murders, the state produced evidence from which the jury could find that Jeffries killed Phillip Skiff by firing seven .22 calibre bullets into his body, and killed Inez Skiff by firing ten .22 calibre bullets into her body. He then buried his victims in shallow graves on their property, and told inquiring neighbors various false stories about their whereabouts. Either before or after the murders, Jeffries helped himself to the currency, gold, weapons and other personal

property of the victims. He headed for Canada, leaving a trail of stolen property and witnesses who saw him selling or attempting to sell items stolen from the Skiffs. He was also seen flashing large quantities of Canadian money shortly after the Skiffs had been murdered. The late Mrs. Skiff had recently withdrawn $30,000 in Canadian currency from her bank in Canada. That money was never found or accounted for.

On November 5, 1983, the Clallam County Superior Court jury convicted Jeffries of two counts of aggravated murder. In a special verdict, the jury also found that two aggravating factors had been proven: (1) that the murders were committed to conceal the commission of a crime or to protect or conceal the identity of a person committing a crime, and (2) that the murders were committed as part of a common scheme or plan. Finding insufficient mitigating circumstances to warrant leniency, the jury sentenced Jeffries to death.

The Washington Supreme Court affirmed Jeffries' conviction and sentence on direct appeal. *State v. Jeffries*, 105 Wash.2d 398, 717 P.2d 722 (*Jeffries I*), *cert. denied*, 479 U.S. 922 (1986). Jeffries filed three personal restraint petitions in state court, all of which the Washington Supreme Court denied. *In re Jeffries*, 722 P.2d 99 (1986) (*Jeffries II*); *In re Jeffries*, 110 Wash.2d 326, 752 P.2d 1338, *cert. denied*, 488 U.S. 948 (1988)

(*Jeffries III*); *In re Jeffries*, 114 Wash.2d 485, 789 P.2d 731 (1990) (*Jeffries IV*).

Jeffries then filed this habeas corpus petition in federal district court. The district court denied Jeffries' petition. Jeffries now appeals that denial.

We review de novo the district court's denial of habeas relief. *Dickson v. Sullivan*, 849 F.2d 403, 405 (9th Cir. 1988). However, findings of fact by the state court are entitled to a presumption of correctness under 28 U.S.C. § 2254(d), *Sumner v. Mata*, 449 U.S. 539, 546-47 (1981); *Hamilton v. Vasquez*, 882 F.2d 1469, 1470-71 (9th Cir. 1989), and are reviewed for clear error. *Norris v. Risley*, 878 F.2d 1178, 1180 (9th Cir. 1989).

In his habeas petition, Jeffries raises a number of constitutional issues covering every phase of his journey to this court. With regard to the district court, Jeffries argues that the court erred in failing to grant him an evidentiary hearing on newly discovered evidence and in refusing to allow him to present certain expert testimony. Concerning the Washington State Supreme Court, Jeffries argues that it was error for that court to make use of an improper report prepared by the trial judge. Concerning his state trial, Jeffries raises a number of issues covering: (1) the form of indictment; (2) fair trial; (3) evidentiary decisions of the trial judge; (4) aggravating

circumstances; (5) mitigating circumstances; and (6) ineffective assistance of counsel.

1. *Evidentiary Hearing*

Jeffries argues that the district court erred in refusing to hold an evidentiary hearing concerning "newly discovered" evidence. The evidence concerns testimony of a travel agent who worked in the same town in which the victims had lived. According to her proposed testimony, three sinister-looking people driving a car with California plates entered her travel agency on the day of the murders and asked for directions to Barr Road or to the Barr Road Extension. The victims had lived on Barr Road.

The district court initially granted Jeffries' motion to hold an evidentiary hearing concerning this evidence. However, due to illness, the travel agent did not attend the scheduled hearing. Instead, her deposition was taken and the district court considered the information it contained in denying Jeffries' motion for a new trial.

A federal evidentiary hearing is mandatory if (1) petitioner's allegations, if proven, would establish the right to relief, and (2) the state court trier of fact has not, after a full and fair hearing, reliably found the relevant facts. *Van Pilon v. Reed*, 799 F.2d 1332, 1338 (9th Cir. 1986). Jeffries can meet neither burden.

First, even if the travel agent's statement is true, Jeffries would not be entitled to relief. The mere existence of newly discovered evidence relevant to guilt is not grounds for federal habeas relief -- more is needed. *Townsend v. Sain*, 372 U.S. 293, 317 (1963); *Gordon v. Duran*, 895 F.2d 610, 614 (9th Cir. 1990). Jeffries must show that the newly discovered evidence would probably have resulted in his acquittal. *Gordon*, 895 F.2d at 614-15; *Quigg v. Crist*, 616 F.2d 1107, 1112 (9th Cir.), *cert. denied*, 449 U.S. 922 (1980). Evidence which suggests only that some other individual *might* have committed the crime rather than showing that the defendant did not commit the crime is insufficient to meet the "probability of acquittal" standard. *Quigg*, 616 F.2d at 1112. Jeffries' proffered evidence shows only that other persons were in the vicinity of the scene of the crime, not that they had any connection with the crime.

Second, Jeffries has already received a full and fair hearing in state court concerning this evidence. *See Jeffries IV*, 789 P.2d at 737.

II. *Expert Testimony*

Before the district court, Jeffries attempted to call to the stand psychologists who were to testify that reasonable jurors would have interpreted the jury instructions and special verdict form in an unconstitutional manner. Jeffries argues that, in refusing to allow him to introduce such expert testimony, the

court committed error. We find no error. *See McDougall v. Dixon*, 921 F.2d 518, 532-33 (4th Cir. 1990), *cert. denied*, ___ U.S. ___, 111 S. Ct. 2840 (1991).

III. *Trial Judge Report*

Jeffries argues that his constitutional right to due process was violated because the state trial judge prepared a trial report for use by the State Supreme Court in its proportionality review without giving Jeffries the opportunity to be heard. Jeffries' argument fails for two reasons.

First, the trial judge twice asked trial counsel for Jeffries to contribute toward preparation of the report but counsel failed to do so.

Second, because the trial judge report is used primarily for proportionality review, not for determining guilt or the sentence, and because Jeffries does not make a proportionality claim, he has suffered no prejudice by the use of the report. Even if the State Supreme Court uses this report to evaluate the evidence justifying the guilty verdict or to support the imposition of the death penalty, the entire trial record is available to fill in gaps that may exist in the report.

IV. *Prosecution by Indictment*

Jeffries argues that Washington's failure to prosecute this capital case by indictment violated his constitutional rights guaranteed by the Fifth, Eighth, and Fourteenth Amendments.

Indictment by grant jury is not part of the due process guarantees of the Fourteenth Amendment that apply to state criminal defendants. *Hurtado v. California*, 110 U.S. 516 (1884), *recently affirmed by Rose v. Mitchell*, 443 U.S. 545, 557 n.7 (1979). This rule has been applied to Washington's state practice of prosecution by information. *Gaines v. Washington*, 277 U.S. 81 (1928). Accordingly, Jeffries' argument fails.

V. *Fair Trial*

Jeffries argues that his right to a fair trial was violated due to: (1) prejudicial media publicity; (2) juror misconduct; and (3) prosecutorial misconduct.

A. *Prejudicial Publicity*

Jeffries argues that he was denied a fair trial because the media publicity surrounding the trial prejudiced the jurors against him. He argues that the trial judge erred in failing to change the venue of the case.

The murders in this case occurred in Clallam County, Washington, population 50,000 (36,250 of whom were eligible for juror duty; 16,400 households). The *Port Angeles Daily News*, a county newspaper with a circulation of about 13,000, provided primary coverage of the murders.

The murders were discovered on April 2, 1983. The *Daily News* ran nine stories on the murders between April 4 and April 19, as well as three more stories in the first two weeks of

May. Both the *Seattle Post-Intelligencer* and the *Seattle Times* ran single articles regarding the murders shortly after their discovery. KOMO Television reported on the murder story for eight of the days between April 4 and 15. KING Television carried stories on April 4, 5, and 15.

The news coverage included: (1) details of Jeffries' Canadian criminal history; (2) the sheriff's statement that Jeffries was armed and dangerous and that the murders were premeditated; (3) details about the nature of the murders; (4) details of Jeffries' arrest; and (5) other details concerning the progress of the investigation.

Jury voir dire was conducted between October 3 and October 19.

On habeas review, this court must "make an independent review of the record to determine whether there was such a degree of prejudice against the petitioner that a fair trial was impossible." *Bashor v. Risley*, 730 F.2d 1228, 1234 (9th Cir.) *cert. denied*, 469 U.S. 838 (1984). This court must independently examine the news reports for volume, content, and timing to determine if they were prejudicial. *Harris v. Pulley*, 885 F.2d 1354, 1360 (9th Cir. 1988). Whether a jury was biased is a question of fact. The trial judge's finding on this question is entitled to a presumption of correctness. *Lincoln v. Sunn*, 807 F.2d 805, 814-15 (9th Cir. 1987).

Defendants enjoy the right of due process to be tried by "a panel of impartial, 'indifferent' jurors." *Irvin v. Dowd*, 366 U.S. 717, 723 (1961). If prejudicial pretrial publicity makes it impossible to seat an impartial jury, then the trial judge must grant the defendant's motion for a change of venue. *Harris*, 885 F.2d at 1361. The prejudice requirement will be satisfied by a finding of: (1) presumed prejudice; or (2) actual prejudice.

1. *Presumed Prejudice*

"Prejudice is presumed when the record demonstrates that the community where the trial was held was saturated with prejudicial and inflammatory media publicity about the crime." *Harris*, 885 F.2d at 1361. Courts rarely find presumed prejudice because "saturation" defines conditions found only in extreme situations. *Id.*

We cannot presume prejudice in this case. We agree with the trial judge and the district court that the nature of the news coverage was factual, and not inflammatory. Moreover, although there was a substantial amount of publicity, the bulk of it occurred six months before jury selection in the case.

2. *Actual Prejudice*

Actual prejudice exists if the jurors demonstrate actual partiality or hostility that cannot be laid aside. *Harris*, 885 F.2d at 1636. "[J]urors need not, however, be totally ignorant of the

facts and issues involved." *Murphy v. Florida*, 421 U.S. 794, 800 (1975).

We find no actual prejudice in this case. First, it is immaterial that almost all of the jurors had heard or read about the case prior to trial. All of these jurors swore under oath that they could impartially judge Jeffries' guilt or innocence.

Moreover, of the 180 venire members, at most 14 were excused, either for cause or peremptorily, because of potential prejudice. Excusing 14 out of 180 venire members for prejudice does not indicate actual prejudice of jurors. *See Murphy*, 421 U.S. at 803 (no prejudice found where 20 out of 78 venire members excused due to partiality). Jeffries points to no aspect of the five volume voir dire transcript in arguing that actual prejudice existed.

B. *Juror Misconduct*

Jeffries argues that he was denied a fair trial because one of the jurors in the case informed the other jurors that Jeffries was a convicted armed robber. The trial judge had excluded evidence of Jeffries' prior convictions during the guilt and penalty phases of the trial.

Two years after Jeffries was sentenced, two jurors filed affidavits concerning juror conduct during the trial. In his affidavit, juror Thomas Tyszko stated that, during the guilt phase, juror Erin Thomas announced to the jury that "Jeffries is

a convicted armed robber . . . oh we're not supposed to know that are we?" Tyszko stated that he had ignored the comment.

In her affidavit, Juror Kathleen Sims claimed that, during the penalty phase, Thomas told the jury that Jeffries "had a record." Sims stated that someone, perhaps herself, responded that Jeffries' criminal record was irrelevant.

Thomas denied making the statements or even that he had heard Jeffries had a record. Eight of the twelve jurors swore that they did not hear anyone refer to Jeffries' criminal record or make such statements themselves.

In assessing whether the alleged juror misconduct deprived Jeffries of a fair trial, the district court conscientiously followed the teaching of *Bayramoglu v.* Estelle, 806 F2d 880, 887 (9th Cir. 1986). The district court assumed the truth of the affidavits, although the state disputed the factual basis for them, and concluded that the juror misconduct, if any, did not affect the verdict.

After the filing of the petition for rehearing, we became aware of a possible conflict between our September 9, 1992 opinion and *Dickson v. Sullivan*, 849 F.2d 403 (9th Cir. 1988) which does not appear to have been briefed or argued in the district court. In *Dickson*, we granted habeas relief where two jurors were exposed to an out of court communication by a deputy sheriff to the effect that Dickson had "done something

like this before." Because of the similarity of the communication heard by two jurors in *Dickson*, and the communication alleged to have been heard by two jurors in this case, we conclude that *Dickson* requires a remand for a factual determination as to the truth of the affidavits. If the district court finds that the alleged misconduct actually occurred, then *Dickson* would appear to require the grant of the writ of habeas corpus.

C. *Prosecutorial Misconduct*

Jeffries argues that a number of statements made by the prosecutor to the jury during closing argument deprived him of a fair trial.

We review remarks by the prosecution in a capital case to determine if they rendered the proceedings fundamentally unfair. Improper argument does not, per se, violate a defendant's constitutional rights. *Darden v. Wainwright*, 477 U.S. 168, 181 (1986); *Campbell v. Kincheloe*, 829 F.2d 1453, 1457 (9th Cir. 1987), *cert. denied*, 488 U.S. 948 (1988). Moreover, we review for plain error prosecutorial comments to which a defendant fails to object. *United States v. Endicott*, 803 F.2d 506, 513 (9th Cir. 1986).

1. *Comment on Jeffries' Right to Remain Silent*

Washington state law provides a right of allocution to the defendant to make a statement during the closing arguments which is not subject to direct or cross-examination. Wash. State

Sup. Ct. Crim. R. 7.1(a)(1). Jeffries exercised this right and indicated that he was not guilty of these murders and refused to beg for mercy for crimes he did not commit. In response, the prosecution said in his closing argument:

> Well, you have heard the defendant in a situation where he does not have to take an oath and in a situation that I can't cross-examine him, and his statement, I submit, is one that is insulting to the intelligence. It is also a statement, I think, full of arrogance.

Defense counsel did not object to this statement and did not offer a curative instruction in response.

The Fifth Amendment prohibits the prosecutor from commenting to the jury on the defendant's failure to take the stand in his own defense. *Griffin v. California*, 380 U.S. 609, 615 (1965). However, such commentary mandates reversal only if: (1) the commentary is extensive; (2) an inference of guilt from silence is stressed to the jury as a basis for the conviction; and (3) where there is evidence that could have supported acquittal. *Lincoln v. Sunn*, 807 F.2d 805, 809 (9th Cir. 1987).

The comment in this case does not create error, much less constitutional error. We agree with the Washington State Supreme Court that the comment constituted, as worst, a rebuttal of Jeffries' contention that he was telling the truth. *See Jeffries I*, 717 P.2d at 722. Moreover, the comment was a single,

isolated incident rather than an extensive tactic by the prosecution.

2. *Caldwell Claim and Eye for an Eye*

In his closing argument, the prosecutor said:

> Phil Skiff and Inez Skiff didn't get due process of law. This man got a fair trial. He got two attorneys. He got resources, he got the benefit, everything that our system gives to a defendant, everything, and he got a fair trial and he will get more than that. *He will get appeals*, you name it, because that is our system and this system has treated him fairly. Something that he didn't do -- he killed unmercifully, but our system gives him due process of law so don't think that you're killing him because you're giving him the law and you're giving him justice.

Jeffries argues that, in making this statement, the prosecutor impermissibly led the jury to believe that the responsibility for imposing the death sentence did not lie with them. Jeffries relies on *Caldwell v. Mississippi*, 472 U.S. 320 (1985). Moreover, Jeffries argues that the statement constituted an impermissible "eye for an eye" argument.

Jeffries' arguments are not persuasive. The prosecutor's passing reference to Jeffries' right to appeal did not indicate to the jury that it was relieved of its responsibility for determining the appropriateness of the death penalty. Jurors know that cases can be appealed. Moreover, the penalty phase instruction made clear to the jury that the responsibility lay with it. Finally, the

statement does not suggest that the jury ignore its legal responsibility impartially to weigh all of the evidence and to impose a death sentence as a matter of retribution.

3. *Prosecutor's Opinion as to Guilt*

Finally, Jeffries argues that the prosecutor improperly informed the jury of his personal opinion as to Jeffries' guilt. After the jury had returned a guilty verdict in which it found the presence of two aggravating circumstances, the prosecutor told the jury: "Well, ladies and gentlemen, you did the right thing. You did the right thing . . . ." Because the prosecutor made his statement after the jury returned its verdict, the statement could not have affected the jury's decision. The statement did not render the trial fundamentally unfair. *See United States v. Gwaltney*, 790 F.2d 1378, 1383 (9th Cir. 1986) *cert. denied*, 479 U.S. 1104 (1987).

VI. *Evidentiary Claims*

Jeffries argues that certain evidentiary errors made by the trial judge warrant reversal.

Federal habeas will not lie for errors of state law. *Estelle v. McGuire*, ___ U.S. ___, 112 S. Ct. 475, 480 (1991). Habeas relief is available for wrongly admitted evidence only when the questioned evidence renders the trial so fundamentally unfair as to violate federal due process. *Id.; Butcher v. Marquez*, 758 F.2d 373, 378 (9th Cir. 1985).

A. *Jeffries' Previous Imprisonment*

Jeffries argues that his trial was rendered fundamentally unfair when a prosecution witness referred to Jeffries' prior history of imprisonment in Canada. When asked by the prosecution when he had first heard of Jeffries, the witness responded: "It was when I met Phil and Inez in Chilliwack that he [Jeffries] used to do carving and things like that when he was in jail somewhere in Canada." Finding that the response was inadvertent and had not been intentionally elicited by the prosecutor, the trial judge denied the defense motion for a mistrial. The judge directed the jury to disregard the prosecutor's question and the witness' response.

We do not believe that the above testimony rendered Jeffries' trial fundamentally unfair. First, the statement was inadvertent and not a prosecutorial attempt to elicit otherwise inadmissible evidence. Moreover, the trial court's remedial instruction to the jury cured any possible prejudice caused by the incident.

B. *Weapons Evidence*

Jeffries argues that the admission of evidence related to weapons possession was contrary to a Washington state rule of evidence and violated his due process rights. At trial, the trial judge allowed the prosecution to introduce evidence showing that Jeffries had been seen with certain rifles, bullets, and handguns.

Jeffries argues that this evidence constituted, under Washington law, impermissible character evidence and that its introduction rendered his trial fundamentally unfair.

Jeffries' assertions of state law error are not cognizable on federal habeas. *McGuire*, ___ U.S. at ___, 112 S. Ct. at 480. Moreover, Jeffries' arguments do not establish fundamental unfairness. The evidence of which Jeffries complains was related to the crimes for which he was being prosecuted. According to the Washington State Supreme Court, the .22 caliber rifle and bullets had been stolen from the victims, the pistols could have been the murder weapon or weapons, and the FBI had determined that the bullets could have come from the same boxes of .22 caliber bullets recovered from Jeffries' stash. *Jeffries I*, 717 P.2d at 731. These determinations are fairly supported by the record and thus warrant a presumption of correctness.

VII. *Aggravating Circumstances*

Jeffries makes a number of arguments related to the two aggravating circumstances which were found to exist in his case. The two aggravating circumstances are:

> (7) The defendant committed the murder to conceal the commission of a crime or to protect or conceal the identity of any person committing a crime.

> (8) There was more than one victim and the murders were part of a common scheme or plan or the result of a single act of the defendant.

Wash. Rev. Code §§ 10.95.020(7), (8).

Jeffries' aggravating circumstances claims address: (1) the sufficiency of the evidence; (2) the definitions of the circumstances; and (3) juror unanimity.

A. *Sufficiency of the Evidence*

Jeffries argues that the evidence in the case was insufficient to establish the existence of either aggravating circumstance. He argues that circumstance (7) requires a finding that the defendant contemplated the commission of a crime prior to committing the murders. Because, Jeffries contends, the trial produced no evidence concerning his motives prior to the killings, circumstance (7) could not have been made out. Similarly, with respect to circumstance (8), Jeffries argues that no evidence demonstrated that he had conceived of some plan concerning the murders prior to their commission.

Evidence supporting aggravating circumstances findings is sufficient if "'viewing the evidence in a light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.'" *Lewis v. Jeffers*, 497 U.S. 764, ___, 110 S. Ct. 3092, 3103-04 (1990) (quoting *Jackson v. Virginia*, 443 U.S. 307, 319 (1979)).

At bottom, Jeffries is arguing that aggravating circumstances (7) and (8) cannot be proven by the use of circumstantial evidence. This assertion is incorrect. *See United States v. Hernandez*, 876 F.2d 774, 777 (9th Cir.), *cert. denied*, 493 U.S. 863 (1989). Sufficient circumstantial evidence exists for a rational jury to find beyond a reasonable doubt that Jeffries had killed the Skiffs to facilitate robbing them. Evidence introduced at trial showed, *inter alia*, that: (1) Phil Skiff had been shot twice in the back of the head "gangland style" and five times in the body; (2) after the murders, Jeffries tried to sell the Skiffs' T.V. and some placer gold; (3) Jeffries was seen flashing large amounts of Canadian money after the murders -- Inez Skiff had withdrawn $30,000 in Canadian currency shortly before her murder and that money has never been recovered; and (4) shortly after the murders, Jeffries left the victims' home with their truck, chain saw, T.V., guns, and other items.

B. *Definitions of the Elements*

Jeffries makes two arguments concerning the elements which make up aggravating circumstances (7) and (8). First, Jeffries contends that these circumstances contain the following elements: (1) a particular crime that was being concealed; (2) a particular plan or scheme; and (3) a specific mental state with respect to the circumstances. Jeffries argues that the trial judge erred in failing to instruct the jury as to the particular crime he

was concealing, the plan he was acting in accordance with, and the mens rea with which he concealed a crime or hatched the plan.

The problem with this argument with respect to items (1) and (2) is that these items are not elements of circumstances (7) and (8) as defined by the Washington Supreme Court. The prosecution need prove only those elements of the crime which are included in the definition of the offense. *Patterson v. New York*, 432 U.S. 197, 210-211 (1977). In *Jeffries I*, the Washington Supreme Court made clear that, with respect to circumstance (7), "[t]he specific crime need not be stated." *Jeffries I*, 717 P.2d at 735. Similarly, the "common scheme or plan" from circumstance (8) is "simplistic" and "needs no definition." *Id*. Because it is the sole responsibility of the States to define the elements of their criminal offenses, *see, e.g., Martin v. Ohio*, 480 U.S. 228, 232 (1987), Jeffries' first argument fails with respect to the definition of "crime" and "plan or scheme."

Concerning item (3), the mens rea requirement, the Washington Supreme Court has found that "[i]t is impossible for a jury to find both aggravating circumstances without also finding that the defendant intended to commit them." *Jeffries I*, 717 P.2d at 735. This is true with respect to killing in order to conceal a crime and killing as part of a plan or scheme. Both

presuppose some purpose on the part of the defendant. Accordingly, no special instruction was necessary to indicate the mens rea requirements of the circumstances as they applied in this case.

Second, Jeffries seems to argue that the terms "crime" and "plan or scheme" are unconstitutionally vague. According to the Supreme Court, capital sentencing schemes must not contain vague elements. Capital sentencing standards must provide a meaningful basis for distinguishing between those cases in which the death penalty is appropriate and those in which it is not. *Godfrey v. Georgia*, 446 U.S. 420 (1980). Under the teaching of *Godfrey*, the phrases "crime" and "plan or scheme," are not unconstitutionally vague. 446 U.S. at 427-28.

C. *Juror Unanimity*

Jeffries makes two arguments that the trial judge erred in failing to give specific unanimity instructions to the jury. First, concerning the guilt phase, Jeffries argues that the judge should have given a specific unanimity instruction as to each element of the aggravating circumstances charged. Because the judge failed to do so, Jeffries contends it is possible that the jurors disagreed as to what crime he was concealing in murdering the Skiffs, or the common plan or scheme under which he was acting.

Jeffries also argues that the trial judge should have given the jury a separate, specific unanimity instruction for each murder count. In other words, the judge should have told the jury that is must be unanimous as to the sentence of death for each murder. At trial, the judge submitted to the jury only one verdict form for both counts, rather than one for each.

A faulty jury instruction will constitute a violation of due process only where the instruction by itself infects the entire trial to such an extent that the resulting conviction violates due process. *Cupp v. Naughten*, 414 U.S. 141, 147 (1973). Where the alleged error is the failure to give an instruction the burden on the petitioner is "especially heavy." *Henderson v. Kibbe*, 431 U.S. 145, 155 (1977).

With regard to juror unanimity, a general unanimity instruction will normally suffice to instruct the jury that they must be unanimous as to the elements which form the basis of the conviction. *United States v. Pavseno*, 782 F.2d 832, 835 (9th Cir. 1986). The exception to the general rule involves situations in which "there is a genuine possibility of jury confusion or that conviction may result from different jurors concluding that the defendant committed different acts." *United States v. Echeverry*, 719 F.2d 974, 975 (9th Cir. 1983). Juror confusion is often a genuine possibility when the nature of the evidence is complex, when there is a discrepancy between the

evidence and the indictment, or some other particular factor creates such a possibility of confusion. *United States v. Frazin*, 780 F.2d 1461, 1468 (9th Cir.), *cert. denied*, 479 U.S. 844 (1986).

Concerning Jeffries' first argument, none of the normal indicia of juror confusion are present. This case involved straightforward facts regarding the murders and did not include complicated legal theories or varied facts regarding different times, places, or personalities. *See Payseno*, 782 F.2d at 837. Moreover, it is irrelevant whether the jurors agreed upon the underlying "crime" or "scheme" as being murder or theft. Under the Washington statute, the specific crime is not an element that needs to be proved beyond a reasonable doubt. *Jeffries I*, 717 P.2d at 735. The findings of a crime or scheme are merely alternative means of finding aggravated first degree murder. *See Schad v. Arizona*, ___ U.S. ___, ___, 111 S. Ct. 2491, 2501 (1991). Thus, the jury need only unanimously agree that the murder was committed to conceal *some* crime or as part of *some* common scheme or plan. The special verdict form indicates that the jurors were unanimous as to these specifics of the crime.

Jeffries' second argument, concerning juror unanimity at the sentencing phase, is also without merit. As the Washington Supreme Court noted in *Jeffries I*, "[i]n a capital case, the jury is to consider not each count separately but all crimes the

defendant has been convicted of in deciding whether death is the appropriate punishment." *Id.* at 735. Jurors in Washington are not required to be unanimous as to the appropriateness of the death penalty for each murder in a multiple-murder trial. They need only be unanimous that the penalty is appropriate because of all of the defendant's crimes. The jury was unanimous on every material question.

VIII. *Mitigating Circumstances*

Jeffries argues that a number of sentencing phase jury instructions prevented the jury from properly considering mitigating evidence. Jeffries also argues that the jury should have been required to specify the mitigating factors it found in his case and the weights which the jury assigned to them.

A faulty jury instruction will require the grant of a habeas petition only if the instruction by itself so infected the entire trial that the resulting conviction violates due process. *McGuire*, ___ U.S. at ___, 112 S. Ct. at 482. The instruction "'may not be judged in artificial isolation,' but must be considered in the context of the instructions as a whole and the trial record." *Id.* (quoting *Cupp v. Naughton*, 414 U.S. 141, 147 (1973)). An ambiguous instruction is reviewed to determine whether there is a reasonable likelihood that the jury has applied the challenged instruction in a way that prevents the

consideration of constitutionally relevant evidence. *Id. Boyde v. California*, 494 U.S. 370, 381 (1990).

A. *Multiple Circumstances and "Having in Mind the Crime"*

Jeffries makes two arguments that a particular jury instruction and verdict form were defective because they hindered the jury from performing its proper function with respect to the determination of mitigating circumstances.

The challenged instruction reads:

> Having in mind the crime of which the defendant has been found guilty, are you convinced beyond a reasonable doubt that there are not sufficient mitigating *circumstance*s to merit leniency?

The verdict form reads:

> During the special sentencing proceedings, the State bears the burden of proving beyond a reasonable doubt that there are not sufficient mitigating *circumstance*s to merit leniency.

Jeffries first argues that the instruction and verdict form prevented the jury from considering a single mitigating circumstance; that they required the jury to find multiple circumstances or none at all. Second, Jeffries argues that the "having in mind the crime" language prevented the jury from

making an individualized determination of the appropriateness of the death penalty.

A sentencer may not be precluded from considering relevant factors in mitigation of the death penalty. *Lockett v. Ohio*, 438 U.S. 586, 604 (1978).

Concerning Jeffries' first argument, the instructions and verdict form to which Jeffries points cannot plausibly be read as precluding the jury from considering a relevant mitigating circumstance should it find only one. This is especially evident given that the jury began it analysis with a presumption of leniency, Wash. Rev. Code § 10.95, and that the jury was instructed as to the definition of only one mitigating circumstance.

As for Jeffries' second argument, the instruction cannot be read to prevent individualized analysis when the instruction is read in the context of the other instructions. One instruction told the jury to consider "any relevant factors" -- this includes all evidence in mitigation. Another instruction defined a mitigating circumstance as "a fact about the offense, *or about the defendant*, ..." Thus, reading the sentencing instructions as a whole, *Boyde*, 494 U.S. at 383, 110 S. Ct. at 1199 (emphasis added), the jury was not precluded from considering any mitigating evidence.

B. *"Any Relevant Factors"*

Jeffries argues that a jury instruction permitting the jury to consider "any relevant factors" rather than "any mitigating factors" is ambiguous and thus prevented the jury from making an individualized assessment of the appropriateness of the death penalty. The instruction is not ambiguous. Washington state law defines "any relevant factors" to include both mitigating and aggravating factors. *State v. Bartholomew*, 101 Wash.2d 631, 683 P.2d 1079, 1088 (1984); *State v. Campbell*, 103 Wash.2d 1, 691 P.2d 929, 944 (1983), *cert. denied*, 471 U.S. 1094 (1985). The jury was not prevented from making an individualized assessment.

C. *Failure to Articulate Mitigating Circumstances*

Jeffries argues that the jury should have been required to specify the mitigating factors and the corresponding weight that it assigned the factors in the sentencing balance. Jeffries cites *Smith v. McCormick*, 914 F.2d 1153, 1166 (9th Cir. 1990) for the proposition that the jury must make specific findings as to all relevant mitigating circumstances, including those it finds insufficient to merit leniency. However, in *Smith* there was a specific state statute requiring the sentencing judge to make written findings as to the weight of the mitigation evidence. *Id.* No such state statue operates in Washington. *Clark v. Ricketts*, 942 F.2d 567, 574 n.5 (9th Cir. 1991), *amended on other*

grounds, 958 F.2d 851 (1992), *petition for cert. filed*, May 18, 1992. Therefore, the rationale of *Smith* does not apply to this case.

Furthermore, due process does not require that the sentencer exhaustively document its analysis of each mitigating factor as long as a reviewing federal court can discern from the record that the state court did indeed consider all mitigating evidence offered by the defendant. *Parker v. Dugger*, ___ U.S. ___, 111 S. Ct. 731, 736-38 (1991); *Clark*, 942 F.2d at 574. Jeffries contends that there is a *Lockett* concern, 438 U.S. at 604, that the jury may have ignored relevant mitigating evidence. However, it is clear from the record what factors the jury considered in its calculus in Jeffries' case. *See Parker*, 111 S. Ct. at 736 (assume trial judge considered all evidence because he said he did); *Clark*, 942 F.2d at 575 (statements of sentencing court that it considered all mitigating evidence satisfy demands of due process clause). The defense offered only one mitigating factor -- artistic ability as evidenced by sculptures Jeffries had created. The special sentencing verdict form indicated that the jury found the presence of two specific aggravating circumstances, a murder committed during the commission of a crime and murder as part of a common scheme. The statements of the jury, i.e., the special verdict form and sentence of death, read in light of the record, show that the jury considered all

mitigating evidence. This process satisfies the demands of the due process clause.

IX. *Ineffective Assistance of Counsel*

Finally, Jeffries argues that his counsel's representation of him was unconstitutionally defective. At trial, Jeffries persuaded his attorneys not to present any mitigating evidence. Jeffries first argues that his counsel's acquiescence in his request denied him the effective assistance of counsel. Second, Jeffries maintains that his decision not to present mitigating evidence amounted to a waiver of counsel and that the trial judge did not properly accept this waiver. Finally, Jeffries argues that his counsel failed adequately to investigate evidence in mitigation.

A. *Counsel's Acquiescence*

Jeffries argues that his counsel's acquiescence in his "unknowing and uninformed" decision not to present any mitigating evidence constituted defective performance. Defense counsel had been prepared to present a mitigation case. However, Jeffries, after a weekend of discussions with his brother and with counsel, decided not to present any witnesses in mitigation. Jeffries repeatedly stated the reasons for his decision:

> I still stand that I am innocent and I believe it and I have no reason to even ask God's forgiveness because I have done nothing and I certainly don't see any reason to beg for the jury or anybody else because I am innocent and that

is how I stand and therefore I don't want to put my loved ones, like my relatives and friends, bring them up here and put them through this when I believe strongly that there is not valid reason to do so.

Counsel for Jeffries told the court:

> Mr. Sowa and myself both believe that our client is perfectly competent and that [it] is his personal decision after a weekend of soul searching, which has caused him to elect this course of actions. While we may not join in it, we believe that the decision is personal enough and made knowingly, voluntarily and intelligently that, as his counsel, we have no choice but to adhere to his wishes.

At sentencing the only mitigation evidence offered was the limited testimony of Jeffries' brother regarding the artistic value of Jeffries' wood sculptures.

To succeed on an ineffective assistance of counsel claim, the petitioner must demonstrate that counsel's performance was so deficient that it fell below an objective standard of reasonableness, and that the deficient performance prejudiced the defense. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). There exists a strong presumption that defense counsel's actions were reasonable and provided constitutionally adequate assistance. *Id.* at 689.

Jeffries' counsel did not render him inadequate assistance. First, Jeffries' decision not to present evidence in mitigation was informed and knowing. His own consistent

words and those of his counsel support this conclusion. His unsworn denial of the crimes during his statutory allocution made his refusal to seek mitigation a logical strategy.

Second, counsel's acquiescence in this decision did not constitute deficient performance. Although the ABA Standards for Criminal Justice (2d ed. 1980) offers some support to Jeffries' contention that his counsel should have presented evidence in mitigation despite his client's wishes to the contrary, the ABA standards serve only as a "guide" for determining whether an attorney's performance is adequate. *Strickland*, 466 U.S. at 688; *Jones v. Barnes*, 463 U.S. 745, 753 n.6 (1983). As the Supreme Court has recognized, "[t]he reasonableness of counsel's actions may be determined or substantially influenced by the defendant's own statements or actions." *Strickland*, 466 U.S. at 691. "Counsel's actions are usually based, quite properly, on informed strategic choices made by the defendant and on information supplied by the defendant." *Id.* Indeed, the Eleventh Circuit has held that "when a defendant preempts his attorney's strategy by insisting that a different defense be followed, no claim of ineffectiveness can be made." *Mitchell v. Chimp*, 762 F.2d 886, 889 (11th Cir. 1985), *cert. denied*, 483 U.S. 1026 (1987).

In this case, counsel for Jeffries had been prepared to present evidence in mitigation and had discussed with Jeffries the

ramifications of failing to present the evidence. Accordingly, counsel did not deprive Jeffries of effective assistance in acquiescing in the latter's considered decision.

B. *Waiver of the Right to Counsel*

Also concerning his decision to refrain from presenting evidence in mitigation, Jeffries argues that his decision constituted a waiver of counsel and that the trial court erred in failing to verify that the waiver was knowingly and voluntarily made. Jeffries' argument fails because he did not waive his right to counsel. Jeffries merely participated in the direction of his own defense. *See State v. Jones*, 99 Wash. 2d 735, 664 P.2d 1216 (1983). Even if the decision could be construed as a waiver, the facts of this case demonstrate that the waiver was knowingly and voluntarily made.

C. *Failure to Investigate*

Jeffries argues that his counsel failed to investigate mitigating evidence. This argument is belied by the record. Counsel had been prepared to offer the testimony of several witnesses, including Jeffries' brother, two of his nieces, and his Canadian parole officer to show Jeffries' prior nonviolent character, difficult childhood, drug problems, and social value of his artwork. Counsel performed well in the face of a difficult client and overwhelming evidence in the prosecution's case.

The judgment of the district court is vacated and the cause is remanded to the District Court for further proceedings on the question of juror misconduct in light of *Dickson v. Sullivan, supra*. In all other respects, the findings and conclusions of the district court are free from reversible error.

VACATED and REMANDED.

FERNANDEZ, concurring with and dissenting to opinion:

I concur in the opinion except as to the part regarding jury misconduct. Part V., B. and the concluding paragraph. As to that, I dissent.

My reasons are those set forth in my dissent to the order granting reconsideration. The opinion underscores the fears I expressed in that dissent. If certain comments were merely made by a juror, an almost ten-year-old conviction for two vicious murders is to be set aside. That, to my mind, is a travesty.

Supreme Court, U.S.
FILED
FEB 17 1994
OFFICE OF THE CLERK

No. 93-971

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1993

JAMES BLODGETT, Superintendent, Petitioner,

v.

PATRICK JAMES JEFFRIES, Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTION PRESENTED

In a death penalty case where the aggravating circumstances are murder to conceal the commission of robbery and murder as part of a common scheme or plan to rob, does extrajudicial information that the defendant is a convicted armed robber deprive the defendant of a fair trial?

LIST OF PARTIES

Petitioner: James Blodgett, Superintendent

Respondent: Patrick James Jeffries

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BRIEF IN OPPOSITION

Respondent respectfully requests that this Court deny the petition for writ of certiorari.

I. OPINION BELOW

The opinion of the Court of Appeals, its second amended opinion, is reported at 5 F.3d 1180 (9th Cir. 1993) and appears at Appendix A of the Petition, pp. A-4 *et seq*. The Circuit Court held,

> [b]ecause we conclude that extrinsic information of the nature alleged to have been communicated here, if true, would have a "substantial and injurious effect or influence" on the verdict, we vacate the grant of summary judgment, and remand for a factual determination as to the truth of the affidavits [respecting the juror misconduct].

Petition, p. A-8. A petition for rehearing was denied and the suggestion for rehearing *en banc* was rejected. Petition, p. A-10.

II. STATEMENT OF THE CASE

In the State of Washington's bifurcated death penalty scheme, Respondent Patrick James Jeffries was convicted, at the guilt phase, by a jury of two counts of aggravated murder in the first degree. 15 REC[1] 4806, 4808; 4810-11. The aggravating circumstances were that the murders (1) had been committed to conceal the commission of a crime or to protect or conceal the identity of any

[1]REC refers to the state court record filed with the district court.

person committing a crime and (2) were part of a common scheme or plan. 15 REC 4798, 4799; *See* Revised Code of Washington (hereinafter RCW) 10.95.020(7) and (8). At the penalty phase, the same jury returned its verdict answering an interrogatory that there were not sufficient mitigating circumstances to merit leniency. 15 REC 4830; *see* RCW 10.95.060(4). Accordingly, Mr. Jeffries was sentenced to death. 15 REC 4920-23; *see* RCW 10.95.080(1).

On direct appeal, the Supreme Court of Washington affirmed, 5-4, Respondent's convictions (and sentence of death) finding that "there was substantial evidence to support the jury's findings and verdict that defendant killed the victims in order to steal their property and to prevent his identification as their killer." *State v. Jeffries*, 105 Wn.2d 398, 407, 717 P.2d 722 (1986).

The trial court, during both the guilt and penalty phases, did not allow the admission of the Respondent's criminal record. *See* 7 REC 2110, 2113; 11 REC 3568. No evidence of prior convictions was admitted. During the guilt phase, shortly after trial had commenced, Juror Thomas, during a discussion of delays in trial stated to the entire jury, "Jeffries is a convicted armed robber." TR[2] 92, 93; 19 REC 5804; *See* TR 5; 19 REC 5854. He then looked around the room and, with a smirk on his face, stated, "oh, we're not supposed to know that are we." 19 REC

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[2]TR refers to the transcript of the evidentiary hearing before the district court.

5855, 5860; TR 91-2, 94; *See* CR[3] 54. Mr. Thomas had, during voir dire, denied any knowledge of the case other than the fact and location of the Respondent's arrest. 3 REC 814-15.[4]

Because the district court made no factual findings regarding conflicting testimony relating to the juror misconduct, the Ninth Circuit remanded for a factual determination. Petition, pp. B-26-27; (District court order on summary judgement); Petition, p. A-8 (Opinion of Circuit Court). The Ninth Circuit held that if the juror misconduct had occurred, Respondent was entitled to habeas relief. Petition, p. A-8.

III. REASONS WHY THE PETITION SHOULD BE DENIED

A. Because the Ninth Circuit remanded for a factual determination

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[3]CR refers to the district court clerk's record.

[4]In addition, during the penalty phase, there was "some discussion of Mr. Jeffries character in light of his possible record." 19 REC 5854, 5805; *but see* TR 10-11.

There was considerable pretrial publicity which included Respondent's criminal history. *E.g.* 12 REC 3771, 3774. However, contrary to Petitioner's inaccurate inferences, Petition, p. 5 and p. 7, n. 5, eleven of the twelve jurors had no knowledge of the respondent's criminal history. 3 REC 838-49, 856; 4 REC 1010-11, 1112, 1120, 1148, 1151, 1176-82; 5 REC 1460, 1462-63; 6 REC 1579-80, 1600-01, 1602-04, 1703-04; 7 REC 1991-92. Specifically, juror Thomas swore that he had no knowledge of the case other than the locale of Mr. Jeffries' arrest. *See* 3 REC 801, 814-15. While Juror Sims had knowledge of a "record," she did not know what that record was. 6 REC 1600, 1602-04.

Defense motions for change of venue, to select a jury from another county, to close the courtroom, to seal certain pleadings and to sequester the jury during the taking of testimony were all denied. 1 REC 167, 179, 264-65; 12 REC 3736; 13 REC 3991, 4036-38; 15 REC 4583-85; 2 REC 531; 1 REC 179-80, 183-84; 2 REC 409. The jury was instructed not to discuss the case with anyone, not to "read, view or listen to any report from any newspaper, radio or television station on the subject of this trial" and not to "seek out evidence on your own." *E.g.* 3 REC 719, 727, 755-56.

by the District Court, this case is not ripe for review.

The Ninth Circuit "vacate[d] the grant of summary judgment, and remand[ed] for a factual determination as to the truth of the affidavits." Petition, p. A-8. Because the Circuit Court remanded to the trial court for factual findings, it is premature for this Court to exercise its discretionary jurisdiction.

In *Brotherhood of Locomotive Firemen v. Bangor & Aroostock R. Co.*, 389 U.S. 327, 328 (1967) (*Per curiam*), the Court denied certiorari "because the Court of Appeals remanded the case [for a factual determination, it] is not yet ripe for review by this Court."[5] In *Virginia Military Institute v. United States*, 508 U.S. ___, 124 L.Ed 2d 651, ___ S.Ct. ___ (1993), the Court denied a petition for writ of certorari. In a concurring opinion, Justice Scalia first noted that

> [t]his present petition, however, seeks our intervention before the litigation below has come to final judgment. The Court of Appeals vacated the judgment that had been entered in favor of petitioners, and remanded the case to the District Court for determination of an appropriate remedy.

Id. "We generally await final judgment in the lower courts before exercising our certiorari jurisdiction." *Id.* 124 L.Ed. at 652 (Citations omitted). *See also Estelle v. Gamble*, 429 U.S. 97, 115 (1976) (Stevens, J., dissenting) ("[T]his Court's decision to hear this case, in violation of its normal practice of denying interlocutory review

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[5]"The Court of Appeals ruled on various legal issues presented to it but remanded to the District Court to consider whether there had in fact been a contempt . . . ." *Id.*

. . . ill serves the interest of judicial economy." (Citation omitted)); *United States v. MacDonald*, 435 U.S. 850 (1978) (pretiral denial of speedy trial claim not final).

Assuming that the Court denies the petition, such denial is without prejudice to renewal of the questions presented when and if certiorari is later sought from the final judgement. *E.g. Urie v. Thompson*, 337 U.S. 163, 172-73 (1949); *Virginia Military Institute v. United States*, *supra*, 124 L.Ed 2d at 652 (Scalia, J., concurring) and cases cited therein.

B. There is no split in the Circuits on an issue of relevance to this case which would merit this Court exercising its discretionary jurisdiction.

By stating that the Ninth Circuit's "new standard" is lacking an express assignment of the burden of proof with respect to juror misconduct (Petition, p. 19), Petitioner has set up a straw man by which it seeks to demonstrate a split in the Circuits thereby justifying the exercise of this Court's discretionary jurisdiction. First, the Ninth Circuit did not establish a "new standard;" it applied well settled principles. See sections D and E *infra*. Second, given the Ninth Circuit's reasoning, it is clear that its decision to remand to the District Court "for a factual determination" would be the same whether the burden was placed on the Petitioner to show harmlessness or on the Respondent to show prejudice.

The Ninth Circuit began its analysis of the juror misconduct claim by noting that the district court had "properly invoked the five-part test set out in *Bayramoglu*

v. Estelle, 806 F.2d 880, 887 (9th Cir. 1986)." Petition, p. A-4. The Circuit Court then appropriately reviewed this case under the recently announced harmless error standard of *Brecht v. Abrahamson*, 507 U.S. ___, 123 L.Ed. 2d 353, 113 S.Ct. 1710 (1993) and recognized that "petitioners now face a greater burden." Petition, p. A-5.

Of critical import to the Ninth Circuit decision was the similarity between the the crimes of which Respondent had been convicted and the juror misconduct:

> Jeffries was convicted and sentenced to death on the basis of two special findings: murder to conceal the commision of the crime of robbery and murder as part of a common scheme or plan to rob. **Against this backdrop**, we find extrajudicial knowledge of Jeffries' prior conviction for armed robbery to be **especially harmful**. Where the extrinsic evidence concerns a prior conviction similar to the charge at issue, "there is a substantial risk that all exculpatory evidence will be overwhelmed by a jury's fixation on the human tendency to draw a conclusion which is impermissible in law: because he did it before, he must have done it again."

Petition, A-6-7 (Citation omitted; emphasis added).

While the court did not expressly assign the burden of proof, it closed by stating,

> [b]ecause we conclude that extrinsic information of the nature alleged to have been communicated here, if true, would have a "**substantial and injurious effect or influence**" on the verdict, we vacate the grant of summary judgment, and remand for a factual determination as to the truth of the affidavits.

Petition, p. A-8 (Emphasis added).

No matter where one places the burden, on a defendant to prove prejudice or on a state to prove harmlessness, it was the Circuit's judgment that Respondent's allegations, if true, demonstrate prejudice, that is, a "substantial and injurious effect or influence," and require the granting of the writ of habeas corpus. Thus, even if this Court were to grant review, hold that the Ninth Circuit had misallocated the burden of proof and place the burden on the respondent to prove prejudice, the result would be no different. Therefore, whether or not there is a split in the Cuircuits on this issue is irrelevant to the outcome of this case.[6]

C. The decision of the Ninth Circuit will not have the dire consequences predicted by Petitioner.

Petitioner, referring to the dissenting opinion below, asserts that "the *Jeffries* decision poses a real threat to the stability of jury verdicts that is almost incalculable." Petition, p. 11. A *WestLaw* search conducted on February 8, 1994

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[6]Paranthetically, Petitioner erroneously cites *United States v. Rowe*, 906 F.2d 654, 656 (11th Cir. 1990) for the proposition that "[p]rejudice is not presumed. The defendant has the burden of demonstrating prejudice by a preponderance of the evidence." Petition, p. 21. This mischaracterizes the holding in *Rowe*. In this quote the Court is referring to which party has the burden of coming forward with evidence of juror misconduct. As stated by the Eleventh Circuit later in the same paragraph from which the above quote was taken,

> If . . . the court determines that the defendant met his burden of showing by a preponderance of the evidence the likelihood of jury prejudice, the burden shifts to the government to prove that the consideration of the extrinsic evidence was harmless.

Id. at 657.

of death penalty cases in the Ninth Circuit since 1988 yielded 35 capital cases. When that search was further limited by the predicate "juror or jury misconduct," only one case was generated: the instant case.[7]

D. The Ninth Circuit did not announce a *per se* rule.

The decision of the Court of Appeals was grounded in the facts of this particular case. As noted above, it was only against the "backdrop" of the aggravating circumstances, murder to conceal the commission of robbery and murder as part of a common scheme or plan to rob, that the extrinsic evidence in this case, "Jeffries is a convicted armed robber," becomes sufficiently powerful to have a "substantial and injurious effect or influence." Petition, p. A-6, A-8. It is not true, as asserted by Petitioner, that the Ninth Circuit announced a new rule requiring reversal of jury's verdict upon the "mere receipt of prior offense information . . . ." Petition, p. 18.

E. The Ninth Circuit did not announce a new rule of criminal procedure.

The Ninth Circuit's opinion is compelled by centuries of jurisprudence and is a straightforward application of the law to the facts of the case. *Dickson v.*

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[7]In the CTA 9 database, the broad query was "'death penalty' & DA(AFT 1987)". This query resulted in 147 citations; factoring out multiple opinions in the same case and unpublished opinions, there were 35 capital cases. The narrower query was "'death penalty' & juror jury /5 misconduct & DA(AFT 1987)". The second query yielded five cites; again factoring out multiple opinions in the same case, only the instant case is a death penalty case with a juror misconduct issue.

Sullivan, 849 F.2d 403 (9th Cir. 1988) and cases cited therein; *Zant v. Stephens*, 462 U.S. 862 (1983); *Burgett v. Texas*, 389 U.S. 109, 115 (1967); *Parker v. Gladden*, 385 U.S. 363 (1966); *Turner v. Louisiana*, 379 U.S. 466 (1965); *Gideon v. Wainwright*, 372 U.S. 335 (1963); *Remmer v. United States*, 347 U.S. 227 (1954); *Mattox v. U.S.*, 146 U.S. 140 (1892); 1 *Burr's Trial* (1807) (Chief Justice Marshall). Contrary to Respondent's claim, no new rule was announced by the Ninth Circuit.

VI. CONCLUSION

For these reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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